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# THE EXPERIENCE OF THE RAPE VICTIM WITH THE CRIMINAL JUSTICE SYSTEM PRIOR TO BILL C-127

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## INTRODUCTION

The purpose of this paper is to document and analyse the experience of rape victims within the Canadian criminal justice system prior to the enactment on January 3rd, 1983, of Bill C-127, a bill to amend the Criminal Code.

In order to establish the groundwork for the body of the paper, a brief historical overview of the rape laws is presented, beginning with a view of ancient societies through to the development of the rape laws in our society.

In Part Two, the police processing of rape complaints is explored. Relying upon a number of Canadian studies, this portion of the paper outlines the experience of the rape victim from the laying of a complaint with the police to the medical examination for forensic evidence. The many misperceptions and prejudices of both the medical profession and the police about rape are discussed.

The most interesting aspect revealed by the studies is the examination of the filtering process of rape complaints, that is, the classification by the police of "founded" and "unfounded" cases. Many factors influenced this filtering process, including the location of the crime, use of alcohol, use of drugs, the presence of violence, the occurrence of other crimes, the relationship between the victim and the offender, the profile of the victim, the timing of the first complaint, the appearance of the victim, medical evidence, and the number of offenders involved. Each of these factors is examined.

Having endured the rigorous scrutiny of the police, and becoming one of the very few victims of rape whose case proceeds to the trial level, what was a rape victim likely to experience in the criminal court system?

As demonstrated in Part Three, the law had developed very special rules and conventions to deal with cases of rape. The creation of these special rules was based largely on an archaic view of women, a view endorsed by eminent legal scholars, writers and legislators throughout the ages.

The doctrine of recent complaint, where a jury was invited to draw a negative inference about the truthfulness of the complainant's testimoney, unless it was proved that she made a complaint of rape as soon as possible after the fact, is examined.

The notion that a woman in a rape case was inherently untrustworthy is illustrated by the very intricate and complex rules of corroboration. The paper explores the history of the corroboration rule and attempts to explain why certain classes of witnesses, including female victims of sexual offences, were believed to be inherently unreliable. The various elements of corroboration are illustrated. As well, the unique role of the judge and jury in this matter is also discussed.

The paper explores the rationale behind the rule and discusses a number of empirical studies which revealed that the espoused reasoning for the requirement of corroboration lay in an ever present irrational mistrust of women.

Criticism of the rule led to reform, both from the legislators and the courts. The paper plots the path of reform in this area.

Another aspect of the trial process reviewed is that of "reputation evidence". Under this heading, the rules of evidence which permitted cross-examination of the complainant as to her prior sexual history are examined as they relate to the issue of consent and to the issue of the credibility of the complainant. The growing criticism of these rules of evidence, which, it is argued, often turned the rape trial into a trial of the complainant, is considered. The ensuing legislative reform, in the enactment of Section 142 and its effect on the laws of rape, is explored. Other issues relating to the conduct of a rape trial and the cross-examination of the complainant to establish the facts of the case are also discussed.

A final issue examined relating to rules of law and the conduct of rape trials is that of consent and the issue of subjective and objective tests for the guilty state of mind required to prove the crime of rape. The two major decisions in the area, Morgan and Pappajohn, are discussed, as well as the debate which arose on these issues among legal scholars.

In the final section of the paper, the issues of convictions and sentencing are discussed. A brief overview of the reported conviction rates for rape is presented. The shamefully low conviction rates tend to prove that rape was a crime that more often than not escaped detection.

In exploring the matter of sentencing, the paper presents the emerging patterns of sentencing and the factors which influence the courts in meting out the penalty. It can be seen that such factors as the heinous nature of the act, the age of the prisoner, the relationship between the offender and the complainant, and the "character" of the complainant, were some of the influencing elements in sentencing.

The last portion of the paper is a brief overview of the rapist in the penitentiary. It attempts to address the issue of the likelihood of the rehabilitation of the rapist. Based upon the facts presented in two major studies on rape offenders, the prospect of treatment for these men appears bleak.

# EXECUTIVE SUMMARY

## HISTORICAL OVERVIEW OF THE RAPE LAWS

Since ancient times, the rape of women has been viewed as an acceptable part of conquest by marauding armies. Although rape has been declared a criminal act under international rules of law, it persists as a common incident of war throughout the world.

Rape has been tolerated and condoned as an inevitable incident of war; the examination of attitudes towards rape within society, not within the context of war, is important for it enables us to comprehend the development of our rape laws and our own view of rape.

In ancient societies, women had few rights. They were viewed primarily as chattels of their fathers and husbands. The attitude of society towards rape focused on the protection of the woman's virginity as a commodity to be bought and sold.

In England, the development of rape laws originated as an attempt to ensure the protection of women as the property of father or husband. Until 1275, rape was a matter to be settled between the offender and the victim's family through military reprisals, monetary compensation and forced marriage, ransom and trial by ordeal. The Statute of Westminster of 1275 was the first statute enacted by the British Government to deal with rape. For the first time, rape became an issue of public safety and state concern and no longer a family misfortune and a threat to land and property.

The law of rape remained virtually unaltered until 1576. By the close of the eighteenth century, English statutory law did little but set penalties for rape. The prohibited act was to "ravish", "rape" and "unlawfully and carnally know" a woman. It remained for the common law to clarify the definition.

During the nineteenth century, Canadian rape law reflected the law of England. In 1841, the first major criminal statute was enacted. The new statute did not define rape, but established a new definition of proof required for conviction. Historically, the crime of rape had generally required proof of emission of the seed, that is proof of impairment of the woman's reproductive capacity. Carnal knowledge was now deemed complete upon proof of penetration alone. The crime was now beginning to be seen as a violation of the woman, rather than primarily as potential interference with the line of descent.

During this period, the issues of consent and resistance were being developed by the Courts. The concepts of corroboration and recent complaint were also being formulated, while the character of the rape victim began to play a prominent role in rape cases.

During the 1800's, the Canadian judiciary appeared to be following English precedent in interpreting the statutory provisions dealing with rape. The issues of force, resistance and lack of consent were considered in a series of cases; it appeared that a victim had to prove that she actively resisted the attack to secure a conviction for rape.

A common theme expressed by the judiciary during this period was the fear of false complaints of rape by women. This fear has remained a dominant factor throughout the history of rape laws, and continues to be evident in contemporary discussions.

Another factor which came to dominate the adjudication of rape cases was the issue of the character and reputation of the complainant. In many instances, it appeared that the victim was standing trial. Again, this theme plays a major role in the development of our rape laws.

Research shows that in nineteenth century Canada, victims of rape had to be virtuous and upstanding women for the Courts to convict. Cases which were likely to go to trial were those involving young, unmarried women living with their families or married women living under the protection of their husbands. It shall be seen upon reviewing the reports of Lorenne Clark and Debra Lewis that very little had changed for the rape victim of the twentieth century.

The first Canadian Criminal Code was enacted in 1892, codifying the criminal laws as they existed. For the first time, Parliament sought to actually define rape. The new definition codified spousal immunity for the first time and appeared to be expanding the notion of lack of consent, moving further away from the strict requirement of proof of resistance.

The development of rape laws during the nineteenth century saw the focus shift from concern over potential interference with a wife or daughter's reproductive function to protection of women from abuse in their own right. The requirement for ejaculation, rupturing of the hymen, and finally, even penetration, was eliminated as the definition of rape was altered and other, lessor offences of assault with intent to commit rape and indecent assault were created. The strict requirements for lack of consent and resistance were modified to protect the mentally handicapped and those coerced by fraud, threats or misrepresentation.

This change signified that rape was no longer conceived of solely as a crime against property; instead, the law was beginning to recognize that women deserved protection from sexual abuse in their own right, that they were entitled as individuals to sexual autonomy.

The codified definition of rape changed very little throughout the twentieth century. The special rules and procedures which came to be associated with rape trials developed over the years and were based upon the same attitudes and fears which were evident in the nineteenth century.

## THE POLICE PROCESSING OF RAPE COMPLAINTS

On January 3rd, 1983, Bill C-127 was enacted, effectively overhauling the provisions of the Criminal Code dealing with the offence of rape. This paper examines and analyses, from the viewpoint of the rape victim, the Canadian criminal justice system prior to the enactment of Bill C-127.

Generally, the rape victim's first contact with the justice system, after the assault, was with the police. What did the victim experience in reporting a complaint of rape to the police? How did the police respond to the complaint? Why did the offence of rape have the lowest conviction rate of any violent crime? Why was rape not reported to the police? What motivated the police to designate cases of rape as "unfounded" or "founded"? What were the underlying prejudices and perceptions surrounding the offence and the victim?

In studying these questions, this report relies primarily upon six Canadian studies which provide the background information. They are:

### (1) TORONTO: CLARK AND LEWIS ("THE TORONTO STUDY")

In 1973, Lorenne Clark and Debra Lewis, two criminologists, approached the Metropolitan Toronto Police Department and requested access to the department's records on rape offences reported for the year 1970. They were provided with copies of the "General Occurrence Reports", the standard forms completed by police officers for each reported offence. Only cases defined as "rape" under Section 143 of the Criminal Code were examined. Cases of attempted rape, indecent assault and those involving victims under the age of fourteen years old were not considered. In all, the data base for this report consisted of 116 reported cases, involving 117 complainants and 129 offenders. The study became the basis of the book co-authored by the researchers and entitled Rape: The Price of Coercive Sexuality published in 1977.

## (2) VANCOUVER: CLARK AND LEWIS ("THE VANCOUVER STUDY")

The second study, entitled Report to the Donner Foundation of Canada: "A Study of Rape in Canada", was completed by Lorenne Clark and Debra Lewis in 1977. Clark and Lewis had approached the British Columbia Police Commission seeking permission to examine records relating to all complaints of rape reported to the Vancouver Police Department in the years 1970 to 1974, to review all transcripts of preliminary hearings on charges of rape in Vancouver during this period, and to interview those rape complainants involved in these cases. The data base for this report consisted of 420 cases. Information was made available to the researchers through "Information Sheets" completed by the police officers and similar to the "General Occurrence Reports" in the Toronto report.

## (3) WINNIPEG: BRICKMAN ("THE WINNIPEG STUDY")

The third report, prepared by Julie Brickman entitled "The Winnipeg Rape Incidence Project", was completed in 1979. This study was based upon a representative survey of 551 women individually interviewed in their homes and representing approximately the entire geographic area of the City of Winnipeg, Manitoba. Each woman was presented with a seventy-four item questionnaire relating to personal experiences with sexual assault.

## (4) CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN REPORT: KINNON ("THE ADVISORY COUNCIL REPORT")

In December of 1981, the Canadian Advisory Council on the Status of Women published a report entitled Report on Sexual Assault in Canada by Dianne Kinnon. This study included unpublished findings of an investigation conducted by five Ontario rape crisis centres dealing with 513 cases reported to the centres from March 1st, 1979 to February 29th, 1980. The information was collected by way of an extensive multiple choice questionnaire used by counsellors and researchers to record information.

## (5) McCALDON REPORT

Another study relied upon was the report of Dr. R.J. McCaldon, which was based upon interviews with thirty convicted rapists serving sentences for rape at the Kingston Penitentiary in Kingston, Ontario. Each of the inmates was interviewed at least twice, and five inmates were chosen for more intensive exploratory psychiatric therapy. Information was also gleaned from the inmates' files located at the penitentiary.

## (6) JOHNSON-GIBSON STUDY

Another report relied upon was a study conducted by Stuart D. Johnson, Lorne Gibson and Rick Linden. The researchers reviewed the files of the Winnipeg City Police Department, including all cases of rape reported for the ten year period from 1966 to 1975. A total of 344 cases of rape and attempted rape were reported, but the data base relied upon by the researchers consisted of 217 "founded" rape cases.

Prior to January of 1983, the legal definition of rape required proof of penetration by the penis into the vagina. It was necessary for specific forensic tests to be completed on the victim to establish the case in Court. Thus, before reviewing the relationship of the victim and the police, the role of the medical profession and the rape victim is explored.

It was found generally that the rape victims were not always satisfied with the treatment they received from the medical profession. It was suggested that female doctors should be available for examinations, and that hospital staff be encouraged to be more sympathetic and supportive of rape victims. It was recommended that hospitals give higher priority to rape victims and standardize the tests and procedures to be followed to ensure that proper information was given to rape victims and that proper follow-up care was initiated. Also, it was suggested that victims be advised as to the availability of abortion in the cases of pregnancy, treatment of venereal disease, and psychiatric counselling if necessary.

With respect to the victim's perception of treatment received by the police, it was found generally that the police were supportive of the rape victims; however, it was recommended that the police be more respectful of women in "non-traditional" and less respectable lines of pursuit (unemployed, prostitutes, those on welfare). Some rape victims complained of being subjected to lie detector tests and of being subjected to other tests to determine their credibility as a witness. Such behaviour on the part of the police made the victims feel harassed.

The most crucial element in the police processing of a rape complaint was the classification by the police of "founded" and "unfounded" charges. The studies revealed that there was a definite bias in the police classification of rape cases; the designation of a case as "unfounded" did not necessarily imply that a rape had not occurred. It appeared that the police designated a case as "unfounded" because they felt that the case would not be successfully prosecuted at Court.

In reviewing the factors which influenced the police classification of cases as "founded" and "unfounded", a general profile emerged of women who, according to Clark and Lewis, "can't be raped". The researchers of the Toronto and Vancouver studies concluded that the major factor in the judgment made to proceed with a case or to terminate investigation was based upon the character of the reporting rape victim. If the victim was drunk when she was first interviewed by the police, if she was a runaway teenager who did not live at home and was unemployed, if she was between the ages of thirty and forty years of age and separated, divorced, or living in a common law relationship, or if she was "idle", unemployed or on welfare, or receiving psychiatric care, generally the police would not pursue the case. Further, if the victim was not hysterical when she reported the crime, or if she waited too long to report the crime, or if she knew the offender, or if she voluntarily accompanied the offender to his residence, or accepted a ride in his car, it was likely that the police would not designate the case as "founded". Where there was evidence of violence, especially where a weapon was used, or where other crimes were committed contemporaneously with the rape, or where more than one assailant was involved in the commission of the rape, the police were more inclined to pursue the investigation.

The factors which influenced the filtering of cases and the classification of "unfounded" and "founded" cases were based in part on the police perception of what cases would be successfully prosecuted. What evidence would be necessary to prove a case of rape in Court? Would a jury believe a woman who was drunk or on drugs at the time of the commission of the act? Would a woman with a history of mental illness make a credible witness? Would the fact that the woman had sustained a severe beating lend credence to her allegation of rape?

It has been said that the public's perception of a typical rape is that of a young, innocent virgin living at home with her parents. Essentially, the aforementioned filtering process, based upon an assessment of the character of the rape victim, reinforced this misperception.

The portion of the paper dealing with the trial process demonstrates the relationship between the factors involved in the filtering process and the trial process.

## THE TRIAL PROCESS

Having endured the rigorous scrutiny of the police, and becoming one of the very few victims of rape whose case proceeds to the trial level, what was a rape victim likely to experience in the criminal court system?

The law had developed very special rules and conventions to deal with cases of rape. The creation of these special rules was based largely on an archaic view of women, a view endorsed by eminent legal scholars, writers and legislators throughout the ages.

## THE DOCTRINE OF RECENT COMPLAINT

There is a rule in common law which has been described as the rule against self-serving statements, self-confirmation or narrative. The rule states that in a criminal case, evidence that a witness has, on a previous occasion, made a statement consistent with his or her evidence at trial, is generally inadmissable. The principle behind the rule is that evidence of a prior consistent statement is superfluous in a system that emphasizes oral testimony as the principal means of proving information before the trier of fact. In addition, the rule has been developed out of concern for trial economy.

Generally, the rule against self-serving statements would have excluded evidence of a rape victim's statement on a previous occasion; however, evidence of a complaint made by the victim shortly after a sexual assault, together with the particulars of the complaint, was admissible in evidence. The complaint was not admitted as proof of the facts asserted, but was admitted to show the consistency of the complainant's testimony. The rule was a remnant of the early common law requirement that a victim of a sexual assault was obliged to raise the "hue and cry", and her failure to do so was taken as a virtual self-contradiction of her story.

The real significance of the doctrine of recent complaint was that where the Crown prosecutor failed to prove the making of a recent complaint by the complainant, a trial judge was required to instruct the jury that they could draw an adverse inference as to the truthfulness of her story.

The doctrine of recent complaint was an aberration in the criminal law, for in most criminal cases the silence of the victim was an irrelevant issue. Indeed, the rule against self-serving statements prevented one from leading evidence of a prior statement. However, in a case of rape, if a victim did not make a complaint at the first opportunity, an adverse inference as to the credibility of the victim was drawn. A complex series of rules relating to the doctrine had been developed over the years. The complaint had to be recent and spontaneous. If some question arose as to the exact words spoken by the victim, the complaint could be held to be inadmissable. Thus, where no complaint was made, or if the complaint was not made quickly enough, or was induced, or where the jury found no "complaint" in law had been made, an adverse inference against the victim unnecessarily undermined her credibility at trial.

Critics of the anachronistic doctrine called for reform and the abolition of this special rule which frequently penalized the victims of rape.

## CORROBORATION

The notion that a woman in a rape case was inherently untrustworthy is illustrated by the very intricate and complex rules of corroboration.

At common law, the evidence of a single witness to a fact was sufficient, if believed, to establish the fact. Consequently, the testimony of a single competent witness was sufficient in law to support a verdict. Within the last 100 years, by statute, and in part by judicial decision, a number of exceptions to this general rule have been created.

The law developed special rules for certain types of witnesses thought to be inherently unreliable to the extent that their testimony could not safely be subjected to the ordinary rigours of jury scrutiny.

Historically, many types of witnesses had been excluded from giving evidence at trial out of a fear that the testimony might be fabricated, and due to a lack of faith in the jury. Over the years, the law evolved to permit all relevant evidence to be admitted; only a small number of classes of witnesses remained suspect, including female victims of sexual offences. Thus, the corroboration rule developed requiring that before an accused could be convicted, corroborative evidence had to exist to substantiate the victim's testimony.

Two variations of the corroboration rule had unfolded - the mandatory rule and the warning rule. The mandatory rule provided that an accused could not be convicted unless evidence capable of corroborating the relevant facts was believed and corroborated the victim's testimony. This rule, enacted in the 1890's, applied to the statutory sexual offences enacted to appease Parliamentarians who objected to the creation of a new series of sexual offences intended to protect the vulnerable new women workers of the industrial revolution. The warning rule - a derivative of the mandatory rule - applied to the common law sexual offences, such as rape, and was made a statutory requirement in 1955. The classic definition of corroboration was enunicated in the Baskerville case and formed the foundation for the development of the rule in both Britain and Canada.

The thinking behind the rule lay in a deep mistrust of women, a reoccurring theme in the history of the rape laws. The law makers and proponents of the criminal justice system upheld the requirement for corroboration in rape cases out of a fear of false charges of rape by women and a lack of faith in the ability of a jury, who, feeling "outraged" by the nature of the offence would be unable to properly evaluate the testimony of a rape victim. A severe penalty awaited the hapless accused who found himself trying to defend a charge which was "easily made and difficult to defend".

The rule was technical and complex and was unevenly applied from jurisdiction to jurisdiction. The onus on the trial judge to make a determination as to whether or not corroborative evidence existed, to draw the attention of the jury to the evidence, and to properly define the intricacies of the corroboration rule, led to many appeals and acquittals. Even a judge sitting alone faced a delicate task of properly addressing him or herself on the technical requirements of the rule.

Was there any necessity to treat a victim of rape any differently than any other witness? The statistics showed that rape was and continues to be one of the most under-reported crimes with one of the lowest conviction rates of all violent crime. Empirical studies demonstrated that rather than exhibiting a bias towards the rape victim, the average juror was more inclined to feel sympathy for the accused.

Further, studies indicated that jurors were generally as sophisticated as judges in their analysis of evidence. Moreover, a judge's instruction to a jury about the corroboration rule often confused the jurors.

Traditionally, in any case, a judge has the right and, in some cases, the duty, to comment on the evidence and to assist the jury as to the weight that should be given to the evidence. As the Law Reform Commission of Canada commented, an enormous superstructure had been erected on the original basic assumption that the evidence of some witnesses should be approached with caution. The rule attracted a number of critics who declaimed the discriminatory nature of the rule as well as its complex legal trappings.

The discretionary warning rule found in Section 142 of the Criminal Code was repealed in 1975. The Courts followed the trend in easing the requirements of the rule in situations where corroboration was still required. In a dramatic move, the Supreme Court of Canada broke with tradition over-ruling the Baskerville case. The Court said that each witness should stand on his or her own testimony, for there was nothing inherent in the evidence of a person who fell into a particular class of witness which made that person any less trustworthy.

## REPUTATION EVIDENCE

Another aspect of the trial process reviewed is that of "reputation evidence".

At common law, evidence relating to the complainant's prior sexual history was considered relevant in connection with the issue of consent and for the purpose of impeaching the credibility of the complainant.

Questions relating to consent were to be answered by the complainant, and if she denied the allegations put to her, evidence could be adduced by defense counsel to impeach her testimony. It was said that if a woman was promiscuous or was known to be a prostitute or indeed had sexual relations with the accused at some prior time, then she was more likely to have consented to the act of intercourse complained of.

Where the questions were related to the issue of credibility, the complainant was not bound to answer and whatever her response, no further evidence could be put forth by defence counsel to contradict her reply. The theory behind this rule stemmed from an anachronistic and biased view of women. It was said that promiscuity on behalf of a woman denoted dishonesty. Thus, a woman who would engage in sexual relations would be the type of person who would lie. As stated, the causal connection between sexual conduct and veracity reflected a primitive notion of human behaviour.

Many critics of the rape laws chastised defense counsel who, under the guise of examining the complainant's credibility, sought to destroy her character before the jury. Others accused the Courts of being unwilling to extend the protection of the rape laws to women considered to be of poor character.

Tests proved that jurors who heard evidence relating to the victim's prior sexual history, whether that evidence was confirmed or denied, tended to disbelieve the complainant. The information decreased their perceived guilt of the accused. Further, studies showed that such evidence influenced jurors, causing them to view the victim as less deserving of protection of the rape laws. The inherent danger of this rule of evidence was the fact that the defence could make allegations about the victim's prior sexual history, although such allegations were untrue.

Parliament responded to the critics of this rule of evidence by enacting Section 142 of the Criminal Code in 1976. It was said that the amendment would reduce the embarrassment endured by rape victims during rape trials, thereby encouraging more victims to report the crime.

Section 142 stated in essence, that the complainant could not be questioned as to prior sexual conduct unless the following criterion were met:

(i) reasonable notice was given;

(ii) sufficient particulars of the evidence to be adduced was provided; and

(iii) the judge decided, after an *in camera* hearing, that exclusion of the evidence would prevent the just determination of an issue of fact, including the credibility of the witness.

Unfortunately, judicial interpretation of this new section extended defence counsel ever wider powers to cross-examine the complainant about her prior sexual history.

In reviewing this new section, the Courts determined that the credibility of the complainant, formerly viewed as a collateral issue, was now an issue of fact in the proceedings. Consequently, the complainant, who was considered to be a compellable witness at the in camera hearing, was bound to answer any questions relating to the issue of her credibility. It appeared that the Courts interpreted the new enactment as balancing the rights of the rape victim with the rights of the accused, despite the fact that the law had been enacted to remedy the unfair treatment of rape victims at trial and to encourage rape victims to report the crime. What was heralded as a law to protect the victim of rape was interpreted by the Courts to give the accused even broader powers of cross-examination.

Another issue not addressed by the new legislation was the issue of conduct of defence counsel in attempting to impeach the complainant's testimony relating to the facts of the case. It has been said that counsel are generally permitted a wide licence to cross-examine the complainant while making veiled suggestions as to the witness' moral character.

The trial judge is the final protector of the rights of the witness. Conduct, obviously calculated to embarrass and humiliate the complainant, can only distort the issues at hand in the eyes of the jurors. Such conduct should not be tolerated by the Courts. If legislators and law reformers are intent in promoting the reporting of rape, reform must encompass all elements of the trial. The victim must not be afraid to complain for fear that the trauma of the rape trial will be more serious than the original assault itself.

## CONSENT

A final issue examined relating to rules of law and the conduct of rape trials is that of consent and the issue of subjective and objective tests for the guilty state of mind required to prove the crime of rape. The two major decisions in the area, Morgan and Pappajohn, are discussed, as well as the debate which arose on these issues.

At common law a good defence to a criminal charge was an honest belief on the part of the accused in the existence of circumstances which would make the act an innocent one. The belief need not be reasonable. The issue was brought to the public's attention by the Morgan case and the Pappajohn case. In both cases, the accused were found guilty of rape. The House of Lords and the Supreme Court of Canada held that an honest belief on the part of the accused was a good defence to a charge of rape. It would be a matter for the jury to determine whether the belief that the victim was consenting to intercourse was honest, and in doing so the jury would look to the reasonableness of the accused's actions. It was cited by both Courts that the defence of mistaken belief would very rarely be put to the jury, for an evidentiary case would have to be first established.

Legal writers both defended and criticized these decisions.

Thomas A. Lewis stated that the issue of consent with regard to rape was a very difficult issue, for sexual intercourse generally takes place in private, and where there is no evidence of violence, there can be no presumption of credibility in favour of the complainant where the accused admits the intercourse but claims consent. Lewis supported the subjective test as being fairer to both complainant and accused.

Toni Pickard argued that mistake about consent should only be accepted as a defence to a rape charge if the mistake is reasonable. She maintained that the costs of taking reasonable care by the accused in a potential rape situation to ensure that the woman is in fact consenting is insignificant compared to the harm done to the woman if she is in fact not consenting. It is very easy for the accused to make a verbal enquiry of the woman to determine her state of mind. The law should require the accused to use a degree of care in its actions, in Pickard's view.

Don Stewart supported the subjective test and called upon the Canadian Parliament to address the problem of clarifying whether the test for mens rea should be objective or subjective in the case of rape. In his view, a new lesser offence to cover a situation where the accused was negligent in determining whether or not the woman was consenting could be created. He was of the opinion that a man who knows a woman is not consenting to sexual intercourse is a wicked man and should be punished severely, whereas a man who is merely negligent in determining whether a women is consenting to intercourse is not wicked and does not deserve harsh treatment by the law.

It can be seen that there was a great diversity of views on the issue of consent in the matter of a rape trial. Critics condemned the availability of the defence of mistake of fact as a "rapist's charter" which would provide an easy defence and acquittal to a rapist however proposterous his story might be. Although the decisions of the Court had spoken of the reasonableness of the circumstances being a yardstick for determining the honesty of the belief, critics condemned the availability of the defence of mistake with respect to the lack of consent as another element of the judicial process which was weighted against the victim.

## CONVICTIONS

Lorenne Clark and Debra Lewis have stated that the data on arrest, convictions and sentencing for those accused of rape showed that it was a myth that rape was treated as a serious crime. Looking at both the "founded" and "unfounded/possibly founded" cases, the researchers found that only 24 percent of these cases led to an arrest. Of the 119 suspects charged with rape in Canada in 1971, only 65, or 54.6 percent, were convicted. Further research revealed the conviction rate for rape in Ontario was 32.1 percent for the year 1971. McCaldon stated that conviction rates for rape varied from 18 to 42 percent, depending on the source.

These figures are low in at least two senses. First, they are low in comparison with rates of conviction for other criminal offences. The vast majority of persons charged with a criminal offence plead guilty, and the general conviction rate is 86.0 percent, whatever the plea. Given the elaborate filtering system which brings only some rape cases to court, the number of convictions for rape represents only a tiny fraction of the number of rapes committed.

It can be seen from the statistics and comments of legal writers and criminologists that generally, the conviction rate for rape was much lower than it was for other serious offences under the Criminal Code. In reviewing these statistics, it is little wonder that some critics of the judicial system proposed that rape was the easiest crime to commit and escape detection, for as Clark and Lewis stated, only a fraction of all rapes were reported; only a fraction of reported rapes were classified as "founded"; only a fraction of "founded" cases led to arrest; and only a fraction of suspects arrested were convicted.

## SENTENCING

The three elements of sentencing in criminal matters are deterrence, rehabilitation and retribution. How have these factors affected the sentencing of the convicted rapist?

Clark and Lewis have stated that although the Criminal Code provided severe penalties for rape, and although theoretically a convicted rapist could be sentenced to life imprisonment, it appeared that the average convicted rapist was not sentenced to more than ten years in prison. They concluded that although society claimed that rape was treated as a serious crime, the sentencing patterns for rape proved otherwise, for the length of sentences for convictions for rape were shown to be comparable with sentences for robbery.

What were the factors considered by the Court in the sentencing of rapists?

While there is no tariff for sentencing in Canada, a range of sentences for a particular offence can be observed and analysed from a review of the cases. A few cases have been examined as a representative sample, in an attempt to understand the range of sentencing and the rationale behind the sentence.

As noted, the maximum punishment for rape was life imprisonment. The maximum penalty was said to be generally reserved for those offenders who appeared to the Court to be a real danger to the community, often due to a personality disorder approaching insanity.

It appears, where the facts of a rape were shocking, where the accused had past convictions for rape or other sexual offences, and an unpromising psychiatric history, the Court often found that a sentence of life imprisonment was appropriate. In cases not involving obvious sexual psychopaths, sentences for rape generally vary between one and twelve years. The following factors were said to be considered by the Courts in sentencing:

1. The age of the prisoner;
2. His past and present condition of life;
3. The nature of the crime;
4. Whether the accused previously had a "good character";
5. Whether it was a first offence;
6. Whether he had a family dependent upon him;
7. The "temptation";
8. Whether the crime was deliberate or committed on momentary impulse; and
9. The penalty provided by the Code or statute.

As noted, Lorenne Clark and Debra Lewis believe that it was a myth that rape has been treated as a serious crime in our society. Even a cursory look at sentencing reveals a contradiction between the theory and the practice.

The maximum penalty for rape provided by the Criminal Code was life imprisonment. It appeared that the maximum penalty was not often meted out, but was reserved for the most heinous acts of rape, for those offenders who appeared to be a real danger to the community, and where rehabilitation appeared to be unlikely. Where the acts were particularly violent, where the victim was a virgin or a young child, and where the victim was subjected to other gross and indecent acts, the accused would generally receive a longer sentence. However, where the attacks were not accompanied by unusual violence, where the accused had no record of similar offences, where the accused had a good character or a family dependent upon him, the Court tended to be more lenient. Further, where the accused and victim knew one another, or where the victim was shown to be of "poor character" in the eyes of the Court, the Courts tended to deal less harshly with the accused in sentencing. The fact that the accused had been drinking prior to the offence, or that he pleaded guilty and saved the complainant the embarrassment of testifying at trial, or the fact that the accused was a young man with some hope of rehabilitation, also influenced the Court in giving a lighter sentence.

## THE TREATMENT OF THE RAPIST IN THE PENITENTIARY

What was the likelihood of the rehabilitation of the convicted rapist? The most telling factor revealed by McCaldon's study was the attitude of the offender to the offence. Only 33 percent of the rapists admitted committing the offence; 27 percent denied the offence; and 33 percent rationalized the offence; while 7 percent were said to be "amnesic".

The psychiatric treatability of the rapists showed little promise; only 7 percent of the rapists were said to be good candidates for psychiatric treatment.

Clark and Lewis had asked the fundamental question "Why do men rape?" In reviewing the information from the General Occurrence Reports, the researchers were intrigued by the information relating to conversations which took place between the victim and the offender during the commission of the offence. The conversations were revealing in attempting to understand the rapist's motivation and state of mind. The researchers were struck by the fact that the majority of rapists involved did not appear to believe that they were committing a crime, and in fact went to great lengths to show that their behaviour was normal and acceptable. This factor of denial was also revealed by McCaldon's study.

J.S. Wormith of the Regional Psychiatric Centre for the Prairies and the Department of Psychology at the University of Saskatchewan, conducted a study of inmates incarcerated in Federal Prairie Region Institutions in 1979.

Wormith stated that there was very little scientific data on sex offenders; in his review of the criminological literature, he found that only 1.44 percent of the material dealt specifically with sex offenders. The problem of lack of information on the sex offender is exacerbated by the lack of programs and treatment facilities in the institutions where they are held. Wormith found that only 8 percent of the federally incarcerated offenders in 1977 received any kind of specialized treatment.

Based on staff evaluations of the offenders, Wormith judged the prospects for treatment. It was said that 67 percent required treatment for sexual deviations. Less than 65 percent of the inmates would admit to having committed the offence or claimed that they could not `recall it. Thirty percent refused to discuss the offence at all with any of the penitentiary staff, and 70 percent were not interested in participating in any treatment programs in the penitentiary although more showed an interest in participating in programs outside the prison system.

Wormith concluded that the successful amelioration of sexual offenders aberrant behaviour was an onerous task. It would appear that the average rapist is an unlikely candidate for rehabilitation in our present prison system.

# PART ONE

## HISTORICAL OVERVIEW OF THE RAPE LAWS

### RAPE: A CRIME AGAINST MALE PROPERTY

Since ancient times, the rape of women has been viewed as an acceptable part of conquest by marauding armies. Indeed, the Bible makes reference to the rape of captive women by Israelite soldiers. Greek historians refer to captured women as "legitimate booty, useful as wifes, concubines, slave labour or battle-camp trophy".[1] As Susan Brownmiller states in her book entitled Against Our Will Men, Women and Rape;

> Down through the ages, triumph over women by rape became a way to measure victory, part of a soldier's proof of masculinity and success, a tangible reward for services rendered.[2]

Although rape has been declared a criminal act under international rules of law, it persists as a common act of war. One need only read of incidents reported during the war in Vietnam and Bangladesh for proof of the prevalence of wartime rape in the modern world.[3]

While rape has been tolerated and condoned as an inevitable incident of war, examining attitudes towards rape within society, not within the context of war, is important for it enables us to comprehend the development of rape laws and our own attitudes towards rape.

In ancient Hebrew society, virgin maidens were bought and sold in marriage for fifty pieces of silver.[4] If a man raped a married woman, both parties were put to death. If a man raped a betrothed virgin, the penalty was death for the offender, and the woman would be offered for marriage at a reduced marriage fee. If the victim was not betrothed at the time of the rape, the penalty was the payment of fifty pieces of silver to the victim's father, and marriage to the victim. It is obvious that the offence was not viewed as an attack against the woman's integrity, but was meant to protect the father's rights over his daughter. "Bride capture", the forcible rape and abduction of a virgin, was a perfectly acceptable manner of acquiring a wife in many societies throughout the ages. It existed in England until the fifteenth century.[5]

In these times, women generally had few rights and did not take their place as equals in society. They were viewed primarily as chattels of their fathers or husbands. The attitude towards rape focused on the protection of the woman's virginity as a commodity to be bought and sold.

Neil Brooks, in an article entitled "Rape and the Laws of Evidence", commented on this fact;

> Certainly, at one time, a woman's chastity was of some social and economic value to her. Being raped was thus a more serious offence than a mere physical assault because it had the effect of diminishing her acceptability as a bride.[6]

The development of rape laws in England originated as an attempt to ensure the protection of women as the property of the father or husband.[7] In Medieval England, punishment for rape took the form of military reprisals, ransom, monetary compensation, and the forced marriage of the offender to the victim.[8] Before 1066, the victim or her kin sought redress for the crime. Generally, the law protected only wealthy, propertied virgins living under the protection of powerful lords.[9] Under Anglo-Saxon law, the offender had to endure trial by ordeal, while the penalty imposed was death and pecuniary compensation to the victim's family.[10]

After the Norman Conquest, the mode of trial became trial by combat, and the punishment was reduced from death to castration and the loss of both eyes.[11] The penalty was spared if the victim agreed to marry the offender, and if King and Church agreed to the union. Brownmiller comments;

> Since consolidation of property was uppermost in the minds of men, we may assume that a violated virgin was encouraged or not encouraged toward matrimony depending on which arrangement of the land was most beneficial, or least convenient, to the domain of Church and King.[12]

During the reign of King Henry II in the twelfth century, prosecution of rape by indictment was introduced.[13] This marked a major threshold in the development of rape laws. The trial was by jury in the King's assize.

The Statute of Westminster of 1275 was the first statute enacted by the British Government to deal with rape. This date marks the beginning of the state's interest in prosecuting rape offences.[14]

The Crown's jurisdiction covered the rape of married women as well as virgins; the penalty was the same for both. Redemption through marriage was permanently banned. The right to prosecute automatically reverted to the Crown if a raped woman or her family failed to institute a private suit within forty days of the act. For the first time, rape became "an issue of public safety and state concern" and "no longer a family misfortune and a threat to land and property".[15]

The Statute also reduced the offence of rape from a felony to a form of trespass, decreasing the penalty from death to two years imprisonment and fine.[16] Within ten years, the second Statute of Westminster was enacted, restoring the crime to its status as a capital felony under penalty of death.[17] The law remained virtually unaltered until 1576. As Constance B. Backhouse states in her article "Nineteenth-Century Canadian Rape Law 1800-1892";

> By the close of the 18th century, English statutory law did little but set penalties for rape. The prohibited act was to "ravish", "rape", and "unlawfully and carnally know". It remained for the common law to clarify the definition.[18]

During this period, the issues of consent and resistance were being developed by the Courts. Lack of consent through fear of death or duress was not a defence to rape.[19] The concepts of corroboration and recent complaint were also being formulated, while the character of the rape victim began to play a prominent role in rape cases.

During the nineteenth century, Canadian rape law reflected the law of England, for the Legislature of Upper Canada had in 1800 enacted legislation adopting the criminal law of England as it stood on September 17th, 1792.[20]

In 1841, the first major criminal statute was enacted, repealing all earlier legislation with respect to offences against the person, and consolidating and codifying the criminal law under one statute.[21] The new statute did not define rape, but established a new definition of proof required for conviction. Carnal knowledge was now deemed complete upon proof of penetration alone. Proof of emission of the seed was no longer necessary.[22] Backhouse interprets this development as a "significant departure from the view of rape as a crime against a form of male property."[23] Historically, the crime of rape had generally required proof of emission - proof of impairment of the woman's reproductive capacity. In Backhouse's view "the crime was now beginning to be perceived as a violation of the woman, rather than primarily as a potential interference with the line of descent."[24]

In 1869, the Canadian Parliament passed a new major criminal law consolidation statute following the example set by the British Parliament in 1861. Although similar to the

British legislation in many ways, the Canadian Statute differed on two important issues. The English Parliament abolished the death penalty for rape, substituting penal servitude for life as the maximum penalty.[25] Canada maintained the death penalty.

The other distinction concerned the issue of proof. The British legislation retained the words "proof of penetration" as an element of rape. Unfortunately, this phrase had produced some vagueness in the law, for some Courts had held that it was necessary to prove the rupturing of the woman's hymen to secure a conviction for rape.[26] In an attempt to secure more convictions for rape, the Canadian Parliament reduced the level of proof to "proof of any degree of penetration" in an attempt to lessen the evidentiary standard of proof required to secure a conviction for rape.[27] Backhouse states that this was "another illustration that the Canadian legislature was coming to view rape as a crime against women rather than against male property rights in women's virginity".[28]

In 1873, further amendments to the rape legislation were enacted. An alternate penalty to the death penalty became life imprisonment or imprisonment for a term not less than seven years.[29] Generally, Canadian penalties remained much harsher than those in Britain.

Prior to 1869 there are no reported cases of statutory rape and only four cases of rape reported in the law reports.[30] Backhouse reviewed the surviving Minute Books kept by the Courts of Criminal Assize and the County Court Judges' Criminal Court Minute Books for Ontario for the period between 1840 and 1892, and discovered 330 cases of rape, statutory rape, assault with intent to commit rape, and indecent assault which went to trial.[31] Backhouse suggested that the large number of reported sexual assault cases may have encouraged the Canadians to deal more harshly with the crime.

During the 1800's, the Canadian judiciary appeared to be following English precedent in interpreting the statutory provisions dealing with rape. The issues of force, resistance, and lack of consent were dealt with in a series of cases. "Rape", although not defined in legislation, had been defined by leading English and Canadian legal writers as the "unlawful and carnal knowledge of a woman by force against her will".[32] It appears from the cases that a victim had to prove that she actively resisted the attack to secure a conviction for rape.

A case which set the standard for resistance was R. v. Fick.[33] Mr. Justice Adam Wilson stated that to prove rape, one must show that the woman was overcome by force or terror, resisting as much as she can, and in such a way as to ensure the accused knew she was resisting to the utmost.[34] In a case reported in 1866, the Crown prosecutor decided not to seek a conviction where the prosecutrix had not cried out during the attack and was said not to have made "proper resistance".

In the case of R. v. Cardo,[35] heard in Toronto in 1888, a father was convicted of rape of his daughter although she had not cried out during the attack. The finding was made because of the unusual and brutal facts of the case. The accused had savagely beaten his wife, driving her from the household and terrorizing the children. He then raped his daughter after threatening her. In this case, despite the lack of evidence of resistance by the daughter, the Court held that there was ample evidence that the daughter had submitted out of fear.

Obtaining consent by fraudulent deception, for instance where a man impersonated the victim's husband, was insufficient to convict for rape.[36] Force and resistance were necessary ingredients of rape.

Rape of mentally handicapped women was not prohibited by legislation until 1886. Until this date, the issues of consent and resistance by the victim were paramount to secure a conviction for rape even where the victim was mentally unfit. In the case of R. v. Connolly,[37] the accused was acquitted of attempted rape of an insane woman because the Court felt that she may have consented through "animal instinct" or "passion". Without evidence of the woman's general character for "decency" or "chastity", the Court was not willing to find that the woman did not consent to the act.

This strict standard of resistance was tempered by legislation passed in 1866 and 1890, which sought to broaden the rape laws to provide protection to mentally handicapped women and those submitting to sexual intercourse through fraud.[38]

A common theme expressed by the judiciary during this period was the fear of false complaints of rape by women. This fear has remained a dominant factor throughout the history of rape laws, and in fact continues to be evident in many contemporary discussions. During the nineteenth century, members of the bench expressed concern that "malicious women" might make false complaints of rape. With this in mind, many judges often appeared reluctant to convict.[39] On the other hand, it was a common belief that juries were overly anxious to convict in charges of rape, and that as a result the system was weighted against the accused. Backhouse reports that these assumptions were not founded in fact, for very few charges of rape resulted in a conviction.[40]

Another factor which came to dominate the adjudication of rape cases was the issue of the character and reputation of the complainant. In many instances, it appeared that the victim was standing trial. As Backhouse comments;

> In adjudicating rape cases, the Courts often turned their attention to the reputation and character of the complainant. Although the decisions stated that this evidence related to questions of credibility and consent, it is clear that the Courts were unwilling to extend the protection of the rape laws to women of doubtful reputation."[41]

The leading case in this area was Laliberte v. The Queen,[42] which held, inter alia, that questions relating to the complainant's prior sexual history were relevant to the issue of credibility of the witness. These questions were said to aid the Court in determining the witness' credibility and character. It was said that a chaste woman would be more inclined to be truthful and a wanton woman a liar.

To illustrate the emphasis placed on the complainant's character, Backhouse describes a case heard in 1858, in Toronto, referred to as the "Sawyer Street Outrage".[43] This case involved the gang rape of a woman who was living in a common law relationship with a known gambler and who was said by the defence counsel to be of the "loosest grade and character". The four accused men were acquitted of rape, although it appears from the judge's comments that he strongly felt that the accused were actually guilty of the crime.

Backhouse concludes that in nineteenth century Canada, victims of rape had to be virtuous and upstanding women for the Courts to convict. Cases which were likely to go to trial were those involving young, unmarried women living with their families or married women living under the protection of their husbands. It shall be seen upon reviewing the reports of Lorenne Clark and Debra Lewis in the second part of this paper that very little had changed for the rape victim of the twentieth century.

A common view of the role of women in nineteenth century society was expressed by Senator Henry Kaulback of Nova Scotia in the Parliamentary Debates of 1866, quoted in Backhouse's article. Senator Kaulback stated;

> A good woman knows she is the guardian of her honour and lives above suspicion. Pure, modest women need not the protection of the law to guard their honour, and no man looking on one surrounded by purity can have evil thoughts ...[44]

The first Canadian Criminal Code was enacted in 1892, codifying the criminal laws as they existed. For the first time, Parliament sought to actually define rape, as follows;

> The act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false or fraudulent representations as to the nature and quality of the act.[45]

The new definition codified spousal immunity for the first time and appeared to be expanding the notion of lack of consent, moving further away from the strict requirement of proof of resistance. The definition now referred to "threats" or "fear of bodily harm" and included "false or fraudulent representations as to the nature and quality of the act".

The development of rape laws during the nineteenth century saw the focus shift from concern over "potential interference with a wife or daughter's reproductive function" to "protection of women from abuse in their own right".[46] The requirement for ejaculation, rupturing of the hymen, and finally, even penetration, was eliminated as the definition of rape was altered and other, lessor offences of assault with intent to commit rape and indecent assault were created. The strict requirements for lack of consent and resistance were modified to protect the mentally handicapped and those coerced by fraud, threats or misrepresentation.

This change signified that rape was no longer conceived of solely as a crime against property; instead, the law was beginning to recognize that women deserved protection from sexual abuse in their own right, that they were entitled as individuals to sexual autonomy.[47]

The codified definition of rape changed very little throughout the twentieth century. As will be discussed in the third part of this paper, the special rules and procedures which came to be associated with rape trials developed over the years and were based upon the same attitudes and fears which were evident in the nineteenth century.

## PART TWO

## THE POLICE PROCESSING OF RAPE COMPLAINTS

On January 3rd, 1983, Bill C-127 was enacted, effectively overhauling the provisions of the Criminal Code dealing with the offence of rape. The purpose of this portion of the paper is to examine and analyse, from the viewpoint of the rape victim, the Canadian criminal justice system prior to the enactment of Bill C-127.

Generally, the rape victim's first contact with the justice system, after the assault, was with the police. What did the victim experience in reporting a complaint of rape to the police? How did the police respond to the complaint? Why did the offence of rape have the lowest conviction rate of any violent crime? Why was rape not reported to the police? What motivated the police to designate cases of rape as "unfounded" or "founded"? What were the underlying prejudices and perceptions surrounding the offence and the victim?

In studying these questions, this report relies primarily upon six Canadian studies which provide the background information. What follows is a brief overview of these studies, including their inherent weaknesses and conclusions.

### A. OUTLINE OF STUDIES

### (1) TORONTO: CLARK AND LEWIS ("THE TORONTO STUDY")

In 1973, Lorenne Clark and Debra Lewis, two criminologists, approached the Metropolitan Toronto Police Department and requested access to the department's records on rape offences reported for the year 1970. They were provided with copies of the "General Occurrence Reports", the standard forms completed by police officers for each reported offence.[48] Only cases defined as "rape" under Section 143 of the Criminal Code were examined. Cases of attempted rape, indecent assault and those involving victims under the age of fourteen years old were not considered. In all, the data base for this report consisted of 116 reported cases, involving 117 complainants and 129 offenders. The study became the basis of the book co-authored by the researchers and entitled Rape: The Price of Coercive Sexuality published in 1977.[49]

As with all the studies, it should be noted that the conclusions drawn by the researchers must be viewed with some caution. Only a small number of cases formed the data base for the study. The information available to the researchers was limited to that found in the General Occurrence Reports, and was often incomplete. Furthermore, the method of police classification of crime in general, produced misleading statistics; for example, if the commission of an act of rape ended in murder, the case was reported as a homicide. In addition and as the researchers themselves note, acts of incest do not necessarily surface within the statistics of rape. Two other problems which emerge are the use of terminology by the different researchers, as well as the different methods of classification relied upon by the different researchers. All researchers agree that the major obstacle to obtaining complete and accurate statistics with regard to rape is the fact that a large number of rapes go unreported.

## (2) VANCOUVER: CLARK AND LEWIS ("THE VANCOUVER STUDY")

The second study, entitled Report to the Donner Foundation of Canada: "A Study of Rape in Canada", was completed by Lorenne Clark and Debra Lewis in 1977. Clark and Lewis had approached the British Columbia Police Commission seeking permission to examine records relating to all complaints of rape reported to the Vancouver Police Department in the years 1970 to 1974, to review all transcripts of preliminary hearings on charges of rape in Vancouver during this period, and to interview those rape complainants involved in these cases. The data base for this report consisted of 420 cases. Information was made available to the researchers through "Information Sheets" completed by the police officers and similar to the "General Occurrence Reports" in the Toronto report.[50]

One problem which confronted the researchers was the fact that the information sheets supplied by the Vancouver police were not always complete. The information varied from sheet to sheet depending on whether a charge was to be laid. If a charge was going to be laid, the police completed the information sheets very thoroughly, indicating the evidence to be submitted by the different witnesses and giving an extensive description of the event and considerable information about both the victim and the offender. Where a charge was not going to be laid, generally very little information was provided.

In an attempt to locate the rape victims who were involved in the cases reported between 1970 and 1974, the researchers, relying upon information provided by the Vancouver police, sent out seventy letters requesting that victims contact them to arrange an interview. Unfortunately, only seven rape victims were subsequently interviewed.

## (3) WINNIPEG: BRICKMAN ("THE WINNIPEG STUDY")

The third report, prepared by Julie Brickman entitled "The Winnipeg Rape Incidence Project", was completed in 1979. This study was based upon a representative survey of 551 women individually interviewed in their homes and representing approximately the entire geographic area of the City of Winnipeg, Manitoba. Each woman was presented with a seventy-four item questionnaire relating to personal experiences with sexual assault.

For the purposes of the Winnipeg Study, rape was defined as;

> A sexual act, forced on a woman by a man (degree of relationship with the man is not relevant), which resulted in oral, anal or vaginal intercourse ... Force is defined as the exertion of power by a man causing a woman to comply against her resistance. Force includes:
>
> (1) Physical violence or threat of violence to the woman or to someone she loves (i.e. child, husband, etc.)
>
> (2) Verbal threats of violence which the woman would find intolerable were they actually to occur.[51]

The study's definition of rape did not comply with the definition found in the Criminal Code. By virtue of the Criminal Code definition, a man could not be convicted of raping his wife. In addition, rape was defined as the penetration of a woman's vagina by a man's penis.

Using its own definition, the Winnipeg Study found that thirty-three of the 551 respondents reported having been raped at some point in their lives, thereby representing 6 percent of the sample, or a rape incidence rate of approximately one in every seventeen women in the population.

### (4) CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN REPORT: KINNON ("THE ADVISORY COUNCIL REPORT")

In December of 1981, the Canadian Advisory Council on the Status of Women published a report entitled Report on Sexual Assault in Canada by Dianne Kinnon. This study included unpublished findings of an investigation conducted by five Ontario rape crisis centres dealing with 513 cases reported to the centres from March 1st, 1979 to February 29th, 1980. The information was collected by way of an extensive multiple choice questionnaire used by counsellors and researchers to record information.

The cases which formed the data base for this study included cases of rape (which complied with the Criminal Code definition of rape), attempted rape, other sexual assaults (which included indecent assault, buggery, and so on), incestual assault, attempted incestual assault, sexual harassment on the job and others. As with the Winnipeg Study, the victims involved with the Advisory Council Report may or may not have reported the occurrence of the rape or assault to the police.

### (5) McCALDON REPORT

Another study relied upon was the report of Dr. R.J. McCaldon, which was based upon interviews with thirty convicted rapists serving sentences for rape at the Kingston Penitentiary in Kingston, Ontario. Each of the inmates was interviewed at least twice, and five inmates were chosen for more intensive exploratory psychiatric therapy. Information was also gleaned from the inmates' files located at the penitentiary. As the author himself states, this study is not a representative study of those who rape, or of those who are charged with rape, but is a study of a small number of men who have been convicted of rape.[52] (McCaldon draws our attention to the fact that the conviction rate of rapists varies anywhere from 18 percent to 42 percent, depending on the source of information, and as such, warns that his study is not based on a representative sample of those charged with rape).

### (6) JOHNSON-GIBSON STUDY

Another report relied upon was a study conducted by Stuart D. Johnson, Lorne Gibson and Rick Linden. The researchers reviewed the files of the Winnipeg City Police Department, including all cases of rape reported for the ten year period from 1966 to 1975. A total of 344 cases of rape and attempted rape were reported, but the data base relied upon by the researchers consisted of 217 "founded" rape cases. Only cases which were classified as "founded" rape cases were relied upon by the researchers. The writers of the report warn that the information consisted only of police records and that consequently, they had no control over the quality of the data. Often police records were incomplete and information provided was inconsistent from report to report.

The study formed the basis for two articles, one entitled "A Situational Theory of Rape" and the other entitled "Alcohol as a Contributing Factor in Forcible Rape".[53]

## B. THE VICTIM AND THE MEDICAL PROFESSION

In most instances, the victim herself made the first contact with the police, either by telephoning or by going into the police station. The victim was interviewed by a constable or a detective at the police station or in her home. Generally, the victim was first instructed to have a medical examination. Thus, before reviewing the relationship of the victim and the police, the role of the medical profession and the rape victim shall be explored.

Prior to January of 1983, the legal definition of rape required proof of penetration by the penis into the vagina. It was necessary for specific forensic tests to be completed on the victim to establish the case in Court. To preserve the evidence, it was recommended that these tests be done within twenty-four hours of the offence. In an article entitled "The Anatomy of Rape",[54] Leslie Sullivan conducted interviews with the Saskatoon Police Force and with two doctors of the University Hospital in Saskatoon to document the procedure followed in the medical examination of a rape victim. In Saskatoon, the police indicated that they did not always have time to accompany the victim to the hospital for the medical examination, but always urged the victim to attend at the hospital to be examined.[55] The victim would arrive at the hospital and be interviewed by a staff member from the roster of gynecologists. The gynecologist would take the history of the patient and examine her, taking the necessary specimens, for instance vaginal swabs. The swabs were then sent to the laboratory where they were examined by a pathologist, who certified the findings. A medico-legal report was prepared for use in Court by the doctor. There were five sources of medical evidence:

1. Marks of violence on the person of the victim or offender in the forms of bruises and scratches;

2. Marks of violence around the genitals, for instance blood, bruising in the vagina and the rupture of the hymen;

3. Presence of stains of spermatic fluid or blood on the clothes of the victim or the offender;

4. Presence of seminal matter in the vagina; and

5. The existence of venereal disease.

The victim's clothes were routinely examined for traces of blood, mud, grass, and other substances. Blood samples from the victim and the offender were taken for comparison with samples of blood found at the scene or on clothes. (Where the offender consented to being examined, he too would be examined for marks of violence about his body and face, as well as genital area).

The doctors also indicated that part of the examination of the victim consisted of a character assessment.[56] The demeanour, morals, and general behaviour of the victim were assessed by the interviewing doctor. The general appearance of the victim, as well as her emotional state at the time of the examination were noted.

During the interview with Sullivan, one of the doctors stated that to him the most important aspect of the examination of the rape victim was to note the amount of bruising and how "roughly" the victim had been handled as proof as to whether there was volition on the part of the rape victim. Sullivan concluded;

> It appears then, that for a rape victim to appear genuine to her examining doctor, who undoubtedly will be a witness for the prosecution, she must show all the signs of great resistance - a lot of bruises, cuts and scratches (likely a broken bone would help).[57]

It is little wonder that many rape victims were critical of the medical attention received and the lack of sympathetic, caring medical personnel encountered.

In an article entitled "Medical Examination in Alleged Sexual Offences", May St. John Cosgrave, a police surgeon in England, expressed her views on the medical examination of rape victims.[58] She stated;

> As we know, to constitute the crime of rape, in England ... three things are necessary:-
>
> 1. The use of force to overcome the woman's will to resist.
> 2. Resistance to the utmost by the woman; a half-hearted resistance and then consent would not be rape ...
> 3. Penetration, but not necessarily, emission.[59]

She stated that the assessment of the general appearance and the demeanour of the complainant, as well as the presence or absence of alcohol or drugs, was of primary importance during the clinical examination. Her attitude towards rape was evident in her remarks regarding the reporting of comments made by the victim during the examination;

> Also, in many cases of alleged rape, consent had been given, then, either due to damaged clothing, lateness of the hour, and fear of trouble at home - a complaint has been made. Thus, the story told to us may differ from that told to the police.[60]

It is interesting to note the role as moralist assumed by the examining doctor in assessing the character of the victim. Dr. St. John indicated that, where there was no physical evidence of resistance by the victim who complied out of fear, the case may rest almost entirely on the assessment of the character of the victim, and as such she felt that the doctor had an important role to play. She noted that she enquired as to the rape victim's previous sexual experiences and that this information became part of the medico-legal report.[61]

Dr. C.A. Douglas Ringrose, an Edmonton doctor working in the area of sexual assault, in an article entitled "Sociological, Medical and Legal Aspects of Rape", expressed his personal views on rape;

> Rape is defined as illicit carnal knowledge of a female without consent effected by force, duress, intimidation or deception. Taken literally, this could apply to many deflorations. In a study of women in this community, first intercourse occurred between the ages of sixteen and twenty-one years; in 90 percent of individuals with a male who exceeded her age by about three years. Many of these deflorations not resulting subsequently in marriage could fulfill the definition of rape where the male is the traditional aggressor and the female is the coy subject who is 'conquered'.[62]

He went on to state;

> In my experience with ... [this study] as well as the assessment of approximately 1,000 victims during the past thirteen years in this community, it can mean several things when a woman complains of rape. First, it can be a bona fide sexual assault. At the other extreme it can be an imaginary incident conjured for unknown reasons. In between these extremes can be situations where the incident was a voluntary act for the most part, but with some extenuating circumstances. These fall into five categories. First, it can involve a youngster afraid of pregnancy or venereal disease ... or who fears detection by her parents. Secondly, it can be a woman having a casual affair who fears detection by her husband ... Thirdly, it can be a woman who was insulted or degraded after the act occurred. Fourthly, it can involve a woman with indignant friends ... Finally, it can be a prostitute who was not paid.[63]

Clark and Lewis found that the rape victim's experience with the medical world varied from area to area, depending on the hospitals involved. They noted that both Vancouver and Montreal police stations appointed doctors to act for them. These medical personnel were knowledgeable as to what evidence was required to prove the case at Court.[64]

In Toronto, the rape victims generally attended at the emergency ward at the nearest hospital. It was found that many of these hospitals did not have a prescribed routine to follow with rape victims, and that many doctors were unwilling to examine the rape victims for fear of having to go to Court to testify. The researchers found that there was no consistent behaviour among the doctors for follow-up treatment of the rape victim, in treating pregnancy, venereal disease or injury. Often the victims were not told about options available in the treatment of venereal disease and were not advised about the availability of abortion. Access to psychiatric counselling to deal with any resulting emotional trauma resulting from the incident was generally not discussed.

In the Vancouver report, the rape victims who were interviewed by Clark and Lewis found that their experiences with the medical profession after the occurrence of the rape were generally negative. Four of the victims had been examined by a police physician and three had attended local hospitals and had been examined by residents or interns. These victims complained that the hospital procedure was too impersonal; they felt that the hospital staff were not sensitive to their plight. The victims suggested that female doctors be available for examinations and that hospital staff be encouraged to be more sympathetic and supportive of rape victims.[65]

The Advisory Council Report indicated that the victims generally had negative attitudes about the medical treatment received after an attack. They complained about delays in the administration of tests, lack of proper materials, and the failure of medical staff to make them familiar with the procedures to be taken at the hospital. It was reported that hospitals generally gave low priority to rape victims unless the victim appeared to be obviously injured. For example, one woman waited eight hours in the emergency room while the gynecologist finished his office hours.[66] In some cities, there was only one hospital which administered the necessary forensic tests for rape and consequently, a victim could find herself being refused by one hospital and being told to travel across town to that one hospital which administered the tests. Many victims came into contact with doctors who were reluctant to examine rape victims because they did not wish to "waste their time in Court".[67] Many complained that no special consideration was made for rape victims and that the staff appeared to be uncaring and insensitive. In fact, some victims felt that the hospital staff were making moral judgments as to whether or not the victim had been "really raped".[68] One victim reported that a doctor had indicated to her that in his opinion there was a fine line between rape and promiscuity. He refused the patient medication to allay her anxiety after the sexual attack.[69] Another doctor told a rape victim that he did not believe that there was "such a thing as rape".[70]

Generally, the rape victims felt that there was a lack of attention paid by the medical community to the emotional trauma suffered by a victim of sexual assault. Of sixty-one women who commented about the medical treatment received, in this report, thirty reported a negative impression, while twenty-four were reasonably satisfied with the treatment received. (However, the rape crisis centre counsellors indicated that most rape victims tended to have low expectations of medical care.[71]) The recommendations put forward by the Advisory Council on the Status of Women suggested that the procedures involved in the collection of forensic evidence be standardized and that medical staff receive special training in dealing with rape. Furthermore, it was suggested that the medical community take extra care to provide all necessary information relating to pregnancy, venereal disease and follow-up care for injuries, as well as counselling for emotional trauma that may be experienced by the rape victims.

In conclusion, it would appear that the first hurdle to be overcome by the rape victim was the medical examination. The researchers were unanimous in their view that the medical procedures should be standardized to ensure that all necessary evidence was gathered, but more importantly, that medical staff be sensitized to the special needs of the rape victim.

## C. THE VICTIM AND THE POLICE

### (1) GENERAL PERCEPTIONS

The police have a very important role to play in the trial process, for they are the ones to decide what rape cases will go to Court. In Sullivan's article, a member of the Saskatoon morality squad indicated that the receipt of a rape complaint and the determination as to whether or not the rape took place occurred at the same time.[72] The officer indicated that there were four steps involved in this procedure:

1. The examination of the scene of the crime;

2. Ensuring that the rape victim has a medical examination;

3. "Checking out" the victim's background; and
4. Determining whether or not the victim is 'legit'.[73]

The constable interviewed would not expand on the meaning of the fourth step.

The most crucial role played by the police in this process is the classification of "founded" and "unfounded" cases. If the police determine that a case is "founded" or "legit", they will proceed with the investigation. Composite drawings will be made, police line-ups arranged, and the case will be pursued actively. If the case is determined to be "unfounded", the investigation is terminated.

Clark and Lewis, in their Toronto study, found that the victims generally had a positive view of the policemen who were involved in the investigations. The same policemen generally followed the investigation from beginning to end, and gave moral support to the victim, preparing the victim for the courtroom experience and advising the victim of the procedural steps involved in the case. Of the women interviewed for the Vancouver report, the general consensus was that the police were the most supportive of all persons encountered during the judicial process.[74] Some victims reported that the police were very good and extremely supportive, while others felt that the police were "just doing their jobs". One victim, subjected to a series of lie detector tests by the police, understandably reported a less than satisfactory experience with the police.

The information reported in the Advisory Council Report indicated that for some, the experience with the police was very harrowing.[75] One victim complained that she had been asked about the minute details of the offence and had been asked to repeat the story several times to different officers to assess her credibility. Of 148 victims who responded to a question on the questionnaire regarding their interaction with the police, 118 of the victims had reported the offence to the police, while thirty had not.[76] It appeared to be a practice for some police officers in British Columbia and Ontario to submit victims of rape to lie detector tests. Naturally, the victims felt harassed by this action.

Some victims complained of delays in police action. For example, in parts of British Columbia, the R.C.M.P., who patrol isolated areas, were unable to respond to calls for periods of up to twenty-four hours.[77] One can imagine that a victim of rape would feel very isolated and alone while awaiting the response of the police to a call for help. Further, where delays in assistance occur, evidence may be lost in the interval and the victim may decide to forego prosecution.

Other victims felt that because of their status in society, as prostitutes or runaways, the police did not treat them with respect and did not treat their reports of rape seriously. Indeed, it was reported that some victims had been charged with public mischief in cases where the police felt that there was no basis for a complaint of rape.

Another complaint made was the failure of some police to keep the victim advised as to whether or not the police were proceeding with the investigation. Further, there were some complaints that alternatives to the criminal justice system available to the victim through the Criminal Injuries Compensation Board or through civil action were not explained to the victims by the police.[78]

## (2) THE FILTERING PROCESS: "FOUNDED" AND "UNFOUNDED" CASES

One cannot read and analyse the material relating to rape without understanding the classification of rape cases as "founded" and "unfounded" by the police. The data base of most research projects which rely on police reports consist solely of "founded" cases. The crucial factor in understanding rape statistics lies in this classification process. Does the fact that the police have classified a case as "unfounded" mean that no rape occurred? What can be learned by studying the means of classification?

In the Toronto study, according to the police classification of the 116 reported cases of rape in 1970, forty-two or 36.2 percent of the cases were "founded" while seventy-four or 63.8 percent were "unfounded". Those determined to be "unfounded" were not investigated. The classification techniques employed by the police intrigued the researchers. In an attempt to isolate the factors behind the classification, the researchers examined all "founded" and "unfounded" cases. Their investigation revealed a definite bias in the police classification. The designation of a case as "unfounded" did not necessarily imply that a rape had not occurred. A refined filtering process was taking place at this stage. In cases labelled "founded" the following features were evident;

1. The victim was a 'credible' witness.
2. The tangible evidence of rape was overwhelming, where for instance the victim was severely beaten.
3. The victim was able to identify her assailant, thereby greatly assisting the police investigation.
4. There appeared to be strong similarities between the case reported and others under investigation.[79]

Reviewing the particulars of the cases designated as "unfounded" by the police, the researchers made their own assessments based upon the available information and devised a third category of cases designated "unfounded/possibly founded". This category included cases listed as "unfounded" by the police, not because a rape did not occur, but due to "other reasons".[80] In each of these cases, it appeared to the researchers that a rape had in fact occurred.

Cases were classified as "unfounded/possible founded" if any of the conditions below were present;

> a) The reason given or implied by the police ... was the unsuitability of the victim as a witness ...
>
> b) The reason given or implied by the police ... was the lack of solid 'corroborative' evidence that would be acceptable in a courtroom ...
>
> c) The victim wished to cease investigation of the crime ...
>
> e) The police appeared unwilling, for reasons of personal or other prejudice, to investigate a complaint which was otherwise plausible."[81]

In each of the cases designated by the researchers as "unfounded/possibly founded" there was factual evidence that a rape had been committed. It appeared that these cases were designated as "unfounded" by the police because of the police perception of the victim's character, or because the police felt that the case would not be successfully prosecuted.[82]

Clark and Lewis concluded that only twelve cases were genuinely "unfounded" (10.3 percent),[83] and at the most, only four were possibly concocted by the victims.[84]

The filtering process is commented upon by the writers;

> The progress of a rape case through the criminal justice system reflects a highly selective process of elimination. Only a fraction of all rapes are reported; only a fraction of reported rapes are classified as founded; only a fraction of founded cases lead to an arrest; and only a fraction of suspects arrested are convicted.[85]

Clark and Lewis indicated that, in their view, a rape had most likely occurred in a 104 of the 116 cases studied.

Using a reporting rate of 40 percent (the highest of all estimated reporting rates), the 104 reported rapes represented the approximately 260 rapes which actually occurred. In this study, the police classified only forty-two of the 116 reported rapes as founded, and arrested thirty-two suspects. The average conviction rate for rape is 51.2 percent; therefore approximately seventeen suspects would have been convicted.

> Thus only seventeen out of approximately 260 rapists are likely to be convicted in Metropolitan Toronto - only 7 percent. As such, it stands as something of a monument to injustice, and a serious indictment of our criminal justice system.[86]

The filtering process takes place on two levels. The first, where the victim decides not to report the case to the police at all, and second, in the police classification of cases as "unfounded" and "founded".

In the Winnipeg Study, only 12 percent of those who indicated that they had been raped at some point in their lives reported the crime to the police, and slightly over half of the victims who did report to the police said they had to be persuaded to do so.[87]

It appears that the reported incidence of rape is increasing. In the years 1969 to 1973, in Toronto, reported rape cases increased by 76 percent,[88] and yet rape remains one of the most under-reported offences. It is estimated by the experts in the field that for every ten rapes committed in Canada, one to four are reported. Some say that only one in twenty-five are reported. Estimates of reports then range from 4 percent to 40 percent.[89]

The second stage of the filtering process, the police classification, is difficult to analyse, for police are reluctant to disclose the factors used to determine whether or not to proceed on a rape case. Clark and Lewis concluded that the police classify cases as "unfounded" generally when the case is problematic. In their estimation, two-thirds of the "unfounded" cases arose from pragmatic considerations of the likely outcome if the case went to trial. The police attempted to screen out cases judged as difficult to prosecute. It was in the minority of "unfounded" cases that police prejudice against the victim was the motivating factor. Whether the average jury would convict in the circumstances appeared to be the important issue.[90]

Clark and Lewis concluded that the police had to be pragmatic, for Crown Attorneys would not prosecute unless they were fairly confident of conviction, and, unfortunately, it was a reality of the system that police efficiency was based in part upon the ratio between the number of charges laid and the number of convictions achieved.[91] The researchers concluded;

> As a result, the police are forced to operate as an elaborate screening device, a highly selective filter, through which only the 'best' of even the founded cases proceed. They try to give the Crown only those cases in which conviction is at least possible ... Clearly, the police should not have to cater to the prejudices of juries in this way.[92]

The writers were convinced that until the myths and prejudices within our society surrounding rape were "fundamentally challenged", that the situation would not change.

Certain factors which influenced the police classification of cases as "founded" and "unfounded" emerged from the study. These factors were as follows:

(a) The location of the crime;

(b) Use of alcohol;

(c) Use of drugs;

(d) The presence of violence, the use of weapons and whether other sexual offences were committed;

(e) Occurrence of other crimes;

(f) The relationship between the victim and the offender;

(g) The profile of the victim, including among other things, her age, occupation, and marital status;

(h) The timing of the first complaint;

(i) The appearance of the victim;

(j) Medical evidence; and

(k) The number of offenders involved in the offence.

## (3) FILTERING FACTORS

### (a) Location of the Crime

It became evident to Clark and Lewis, in the Toronto study, that the police tended to classify rape as "founded" if the incident occurred in the victim's residence, and tended to classify a case as "unfounded" where the rape occurred in the offender's residence. For example, 63.2 percent of cases which occurred in the victim's residence were classified as "founded", while 28 percent of the rapes which occurred in the offender's residence were classifed as "founded".[93] Also, it was more likely that a case would be classified as "unfounded" if the rape occurred in a vehicle, street, park, or other residence. As stated by the researchers, "the specific location of the rape offence is a significant variable in determining police classification".[94] It was noted that about one-half of all the cases occurred in a vehicle or a public place.[95]

It was the impression of the researchers, from statements made on the General Occurrence Reports, that what was important in determining police classification in these categories was the nature of the initial contact between the victim and the offender. If the victim was hitchhiking or accepted a ride with a stranger, there was a general tendency to classify the case as "unfounded".

> What is clear ... is that it is the prior behaviour of the victim, and not the behaviour of the accused, which plays a decisive role in the subsequent fate of rape cases.[96]

It is interesting to note that in the Vancouver study, Clark and Lewis found that the location of the offence, at least in terms of its general classification of public or private location, was not a significant variable in police classification.[97] The researchers noted that in Toronto there was a greater likelihood for the case to be classified as "founded" if the offence had occurred in the victim's residence, and a greater likelihood for the case to be classified as "unfounded" if the offence occurred in the offender's residence. In Vancouver, the same rule did not apply. Of the "founded" cases, 24.1 percent occurred in the victim's residence, and only 17.2 percent of the "unfounded/possibly founded" cases occurred in the offender's residence. However, in the majority of cases where the victim had agreed to accompany the offender to his home, the police tended to believe that the victim would not make a good witness at trial, and that her behaviour would be seen by the jury as an erosion of her testimony as to the non-consensual nature of the act. Although the location of the offence did not tend to play a dominant role in the initial classification of the cases as "founded" and "unfounded", it appeared that the occurrence of the offence in the victim's home was a favourable variable for the case to be brought to the preliminary inquiry stage. Of all the cases going to the preliminary stage, 29.1 percent of the cases were those where the rape occurred in the victim's home.[98] It was also noted that vehicle occurrences were under-represented among cases going to the preliminary stage. About one-tenth of the cases going to preliminary were the result of the victim hitchhiking.[99]

The fact that a victim was attacked in her own home worked in her favour in the filtering process. Where, however, the victim found herself raped in the offender's home after agreeing to accompany him there or where she voluntarily agreed to enter his car for any reason, the police were less likely to pursue the matter. Overall, it appeared that the victim's behaviour was an important element in police classification.

> All of these findings substantiate the view that voluntary prior conduct of the victim which got her into the situation in which, or out of which, she was subsequently raped is a variable which operates to filter cases out of the system at one point or another .....
>
> The societal beliefs which underlie the problems which this data reveals are very subtle, but chief among them is the belief that women are responsible for ensuring their own protection and that it is therefore their own fault if they engage in risk taking which leads to bad results.[100]

In the Winnipeg report, the researchers ascertained that 21 percent of the rapes reported took place in "homes", including the victim's, assailant's, and other people's homes.[101] Only 12 percent of the rape cases occurred "outside", which included back alleys, street corners, school grounds, open fields and so forth.[102]

In the Johnson-Gibson Study, the statistics showed that 44.1 percent of the rape occurrences took place in a residence - that is, of the victim, the accused or other person. The authors stated that rape was twice as likely to occur in the victim's or accused's residence when the parties were known to each other than when they were strangers. Of sixty-three events of rape which occurred in the victim's residence, 50.8 percent of the victims lived alone. In this study, 23.5 percent of the rapes took place in an automobile.[103]

In the McCaldon study, 11 percent of the rapes occurred in the offender's home, while 25 percent occurred in the victim's home, and 7 percent occurred in the home of a friend. It was found in this study that 18 percent of the rapes occurred in a public place.

### (b) Use of Alcohol

Clark and Lewis found in the Toronto study that evidence of either the victim or the offender, or both, drinking prior to the offence occurring was a significant factor in determining police classification. Where the victim was determined to have been drinking prior to the offence, it was more likely that the police would classify the case as "unfounded". In fact, 100 percent of the cases where the victims were described as "drunk" or "intoxicated" on the General Occurrence Reports were classified as "unfounded".[104] It was suggested that the police presume that such cases will not be successful if proceeded to Court, and that the general public believe that drunk women are "fair game", "deserve what they get", or are more likely to have been responsible for their rapes.[105]

On the other hand, where the offender had been drinking alone, the majority of the cases were classified as "founded" (66.7 percent).[106] Again, it was suggested that the police believe that the Courts are more inclined to believe that an inebriated man would more likely commit a reprehensible crime such as rape.

In the Vancouver study, Clark and Lewis found that alcohol use by the victim, although a significant variable in police classification in the Toronto study, was not as striking a variable in the findings in the Vancouver study.[107]

The researchers did find that mutual use alcohol, that is, where the victim and offender were drinking together before the offence occurred, was a significant variable in determining police classification, and that such cases had a greater likelihood of being classified as "unfounded". Thus, in cases where the victim was drinking prior to the offence with the offender, or was drinking alone, there was a greater likelihood that the case would be classified as "unfounded". Unlike the findings in the Toronto case, the Vancouver study revealed that the use by the offender alone of alcohol led to a greater likelihood of a classification of "unfounded".[108] The researchers stated;

> Thus, mutual alcohol use leads to a greater probability of an unfounded classification; alcohol use by the victim alone leads to a greater probability of an unfounded classification; and use of alcohol by the offender alone leads to a greater probability of an unfounded classification. The victim is penalized even for drinking alone, while the offender is not penalized for drinking alone and is awarded a positive advantage for drinking with his victim.[109]

In the Gibson-Johnson study, the researchers relied upon information collected from police records and therefore had no control over the quality of the data. In attempting to isolate the presence of alcohol as a contributing factor to rape, the researchers were limited by the fact that no precise record of blood alcohol in the victim or the offender was recorded in the police records. Consequently, the researchers had to rely upon statements recorded by the police and made by the victim, the offender, other witnesses, and the police themselves. The findings of this report are significant in illustrating the importance of alcohol as a variable in police classification.

Johnson and his colleagues indicate that the relationship between alcohol and crime, particularly violent crime, is well established; research indicates that a substantial proportion of those convicted of criminal offences were under the influence of alcohol. Prison inmates, the writers state, generally tend to have more severe drinking problems than the general public.[110]

The files of the Winnipeg City Police Department revealed that alcohol was present in 72.4 percent of the rape cases and was absent in 27.6 percent of the cases. In 38.7 percent of the cases, both victim and offender had been drinking prior to the offence. In 24.4 percent of all "founded" cases, the offender only had been drinking, and in 9.2 percent of the cases, the victim alone had been drinking prior to the offence.[111]

The researchers also explored the relationship between the presence of alcohol in the rape situation and the amount of force used in committing the offence. The presence of violence in a rape situation was a significant factor in police classification.

It was found that when alcohol was present in the rape situation, there was a greater likelihood of violence taking place than when alcohol was absent.[112] It appeared that the relationship between alcohol use and violence was weakest when the alcohol had been consumed by the victim alone or by the offender alone and was strongest when both the offender and the victim had been drinking together.[113]

Of the cases reviewed, data regarding injury was available in 191 cases. The victim suffered injury in 113, or 59.2 percent of these cases.[114] The research showed that there was an association between the presence of alcohol in the rape situation and injury to the victim, which varied according to who had been using the alcohol. The data showed that there was almost no relationship between the use of alcohol by the offender alone and injury to the victim, but there was a greater likelihood of violence to the victim if both the victim and the offender had been drinking, or if the victim alone had been drinking.[115]

In the McCaldon study, it was found that 10 percent of the rapists were "drunk" when they committed the act of rape, and 53 percent of the rapists had been drinking prior to the commission of the offence. Only 37 percent of the rapists were sober at the time of the offence.

McCaldon warns that these statistics may be misleading because the information was gathered from the inmates themselves. He stated that many incarcerated sex offenders blame their sexual "acting out" on intoxication, often to rationalize the offence or as a "blanket psychological defence" to the offence.[116]

### (c) Use of Drugs

In the Vancouver study, Clark and Lewis found that drug use by the victim was a significant variable in police classification. It was noted that the use of drugs by the victim was a variable which selected cases out of the criminal justice system. In the cases designated as "founded", the victim had used drugs in 1.7 percent of the cases, whereas in the "unfounded/possibly founded" category, the victim had used drugs in 6.9 percent of the instances.[117] The data also revealed that drug use by the offender alone in Vancouver was a variable which tended to influence the police in classifying the case as a "founded" case. The mutual use of drugs tended to lead to a classification of "unfounded". The researchers indicated that so few of the cases at the preliminary hearing stage involved drug use that the relationship between the drug use and the moving of the case through the system was not tabulated.[118] In conclusion, the researchers stated that virtually all cases where the victim had used drugs prior to the offence were screened out and were not proceeded with. It appeared that drug use was not a factor in the Toronto report.

## (d) Use of Violence by Offender

Clark and Lewis have stated:

> According to the legal definition, sexual intercourse is rape only if it occurs either without the woman's consent, or with her consent where that consent is obtained through fraud, or through the use or threat of physical force. In the vast majority of cases, some evidence of force is necessary to substantiate a rape charge; otherwise, no one will believe that the victim did not consent. Generally, the victim is more likely to be believed, her report is more likely to be classified as founded, and her rapist is more likely to be convicted, if some form of violence is manifested in the act.[119]

It has been found that the use of violence by the offender is a factor which affects police classification of rape cases.

As stated, one problem in attempting to understand and compare the data provided in the reports is that of the terminology used by different researchers. For instance, some researchers classified "physical force" as the use of weapons only during the commission of the act, while others included situations involving the use of weapons or the use by the offender of parts of his body to exert force. Indeed, in the General Occurrence Reports completed by the Metropolitan Toronto Police, the word "penis" was often inserted under the heading "Weapon", only adding to the confusion.[120] Further, some police reports did not often clarify whether or not a weapon had been used, and therefore the figures for weapons used must be taken as minimums.

Clark and Lewis found in the Toronto study that 71.4 percent of cases involving the use of a weapon were classified as "founded", while 64.4 percent of cases where no weapon was involved were classified as "unfounded".[121]

It was also evident from the data that visible evidence of physical injury incurred by the victim encouraged the police to classify a report as "founded" - a total of 62.5 percent of cases in which the rapist displayed physical violence were classified as "founded".[122]

It was also noted that the police were more likely to classify cases as "founded" if the rapist made verbal threats to his victim. The writers stated;

> The actual or threatened use of violence affects police classification because, ultimately, it affects jury decisions. The greater the degree of violence, the more likely a jury is to believe that the victim did not consent to intercourse, and that the commission of the crime placed her at serious risk.[123]

Clark and Lewis found that weapon use by offenders in the commission of rape was more extensive in Vancouver than it was in Toronto.[124] The use of a weapon proved to be a significant factor in police classification in Vancouver as well.

The researchers found that the use of a gun in the commission of the offence was a specific variable within the general factor in police classification, with 81.3 percent of cases involving guns being classifed as "founded".[125]

In the Vancouver report, in cases where the victim endured verbal threats by the offender, there was a greater likelihood of the case being designated as "founded", and a greater likelihood that the case would be moved through the system to the preliminary inquiry stage. It is interesting to note that more violence was threatened in Vancouver than it was in Toronto; it was clear from the statistics that the presence of threats and physical harm was among the variables determining police classification.[126]

The Winnipeg project revealed that the most frequent type of force used by the assailant was the restraining of the victim by the use of part of the offender's body.[127] Ninety-one percent of the rape victims reported this form of force. Seventy percent of the rape victims indicated that they had been verbally threatened, while 12 percent of the rape victims indicated that they had been threatened by the actual use or display of weapons.[128]

In the report prepared for the Advisory Council, data revealed that of 200 victims (which included victims of both rape and sexual abuse), there were forty-eight instances of beating or choking, ten instances of being tied, drugged or blindfolded, one instance of being shot or stabbed, and four other instances of physical injury.[129] In another sample of victims, over half (58.5 percent) suffered physical injury as a result of the assault, including severe beating, burning, choking or hitting, internal injury, including bruises or lacerations to the anus or vagina, and other kinds of physical injury.[130]

Evidence of injury suffered by the victim was another significant variable in police classification. The extensive use of violence, including such things as bad beatings, being punched, slapped or kicked, rendered unconscious, choked or gagged, suffering broken bones or teeth, and major lacerations generally led to a finding of "founded".

In the Vancouver project, the researchers indicated that the presence of extensive, but not minor injuries, was the significant variable in determination of police classification. Injuries to victims of "founded" cases were consistently more serious than those suffered by victims of "unfounded/ possibly founded" cases.[131] The presence of injuries to the victim was also an important variable which selected cases to go forward in the judicial system, for the researchers found that 60 percent of cases reaching the preliminary inquiry stage involved injuries to the victim.[132] The researchers concluded:

> ... the data suggests what also seemed clear from analysis of the police data, namely, that it is the presence of extensive injuries, particularly those associated with lacerations and abrasions to the vagina, which is the specific operative variable.
>
> Cases involving injuries more closely conform to the public stereotype of 'real rape'. They also substantiate the non-consensual nature of the event, and raise a presumption that real harm was done to the victim.[133]

McCaldon found that in 84 percent of the cases studied force was an element of the rape, and threats to the victim were an element of the rape in 16 percent of the cases. He concluded that a person was more likely to be convicted of rape if more force was used and was less likely to be convicted if only threats were made.[134]

Another important variable in police classification was the occurrence of other sexual acts committed against the victim, besides that of vaginal penetration.

In the Toronto report, other sexual acts, including fellatio, cunnilingus, oral copulation, anal intercouse, self-masturbation by the offender, and victim masturbation of the offender, occurred in 23.3 percent of the cases studied.[135] Where other sexual acts occurred, the police were more likely to classify the case as "founded", and in this instance the police classified 60.9 percent of such cases as "founded".[136]

In the Vancouver study, Clark and Lewis found that almost three times as many "founded" as "unfounded/possibly founded" cases involved the commission of forcible fellatio. It was concluded that the occurrence of forcible fellatio was a signficant specific variable which was determinative of police classification in Vancouver, and which was not a significant variable in the Toronto study.[137] The researchers indicated that generally, the police were more likely to find that a case was "founded" if it was characterized by other sexual acts. This was also a factor in the movement of cases through the criminal justice system. These factors contributed to the profile of the offender, which more closely conformed to the stereotype image of the "real rapist".[138] It was assumed that the jury would more likely believe that a rape had occurred if the rapist appeared to be somewhat perverse or depraved. Also, the jury was more likely to be sympathetic to the victim if she had had to endure "abnormal" or "deviant" sexual acts.[139] Consequently, the system favoured cases where other sexual acts were a factor.

### (e) Occurrence of Other Crimes:

Another significant variable in police classification was the commission by the offender of other crimes contemporaneously with the act of rape. Where, for instance, the rape was accompanied by theft, the police were more inclined to classify the reported rape as "founded", perhaps because the police believed that the recovery of the stolen goods constituted corroboration of the victim's testimony and lent more weight to the entire case.[140] This was the conclusion reached by Clark and Lewis in the Toronto study.

In the Vancouver study, the researchers found that the occurrence of theft after rape was not of great significance.[141]

### (f) Victim-Offender Relationship

In the Toronto study, Clark and Lewis used three headings to categorize the victim-offender relationships in existence prior to the commission of the offence. In the first category of "Known", the victim knew the offender well before the occurrence. In the second category of "Acquaintance", the victim did not know the offender well, but had met him prior to the situation out of which the rape developed, or had knowledge of him through mutual friends or general reputation, and in the third category of "Stranger", the offender was either a complete stranger to the victim, or someone whom she had just met in the situation out of which the rape developed.[142]

As previously stated, it becomes very difficult to compare the results of different studies because of the different terminology and definitions used by the researchers. For instance, in the study prepared for the Advisory Council, the categories used to define the victim-offender relationships are "Stranger", "Known Slightly", "Some Relationship", "Close Relationship", and "Other".[143] In the Winnipeg project, the relationship between the victim and offender is broken into only two categories of "Total Stranger" and "Friend".[144]

Clark and Lewis in the Toronto study make note of this difficulty, indicating that, for example, in previous studies, a person was not classified as a stranger to the victim if the victim had immediately prior to the rape met him in a bar or at a party, thereby making it appear that far fewer rapes occurred between strangers than was in fact the case. Another difficulty facing the researchers was the fact that the police reports did not often accurately describe the relationship between the offender and victim. However, the researchers were able to indicate that the largest category of "founded" cases were those involving rape between strangers. In fact, 80 percent of all "founded" offences involved strangers.[145]

In the Vancouver study, the researchers indicate that the relationship between the victim and the offender was the most important variable in police classification. Where persons were well known to one another, there was a greater likelihood that the case would be classified as "unfounded". The same was true for acquaintances.

The researchers concluded:

> Thus, it appears clear that the greater the degree to which victim and offender are known to each other, the greater the probability of an unfounded classification. There is a clear bias in favour of classifying a case founded if it involves a victim and an offender who are totally unknown to each other; we believe that this is a direct reflection of the fact that the greater the extent to which reported rape occurrences conform to popular stereotypes of "real rape", the greater the probability that the complaint will be classified as founded.[146]

The significance of this variable was found to be important at the preliminary inquiry stage as well in the Vancouver study.

In the Advisory Council study, it was found that 27.3 percent of the cases involved strangers, while 23.2 percent of the cases involved persons known slightly. In 12.7 percent of the cases, there was some relationship between the parties, that is, they were co-workers or neighbours, and in 27.5 percent of the cases the parties had a close relationship, for example, they were family members.[147]

McCaldon reported that 79 percent of the rapists were strangers to the victim. His categories of relationships included "Lovers", "Friends", "Acquaintances", "Strangers" and "Relatives". In this study, 4 percent of the cases involved friends, 10 percent involved acquaintances, and 7 percent involved relatives.[148]

### (g) Profile of the Victim

Clark and Lewis discovered that the rape victim's background and character strongly influenced the manner in which her report of rape was classified by the police. They stated;

> It is not the rape victim who commits the offence, but it is very clear from our data that the primary determinants of police classification are variables which describe the victim - her age, her marital and occupational status, her emotional and physical condition when she reports the crime. These are the factors which determine whether a case will proceed further in the criminal justice system, or be dismissed as 'unfounded'.[149]

#### (i) Nationality

It did not appear to the researchers in the Toronto study that the victim's country of origin was a distinguishing feature of rape victims in general, or a consideration in police classification of rape reports. The data revealed that over three-quarters of the rape victims were English speaking and were born in Canada.

In the Winnipeg project, of the 551 women who responded to the questionnaire, 81 percent were Caucasian.[150]

In the Vancouver study, it appeared that the vast majority of the victims were white (96.1 percent) and that the vast majority of the non-white victims were of native origin.[151] The researchers indicated that there was no evidence that non-white victims were viewed as any less credible than white victims, although there was a higher percentage of "unfounded/possibly founded" cases for non-white victims. This discrepancy was accounted for, the researchers believed, by other factors relating to ethnic minorities rather than blatant police bias. They felt that those in the ethnic minorities were discouraged by their own communities from proceeding with charges. There was generally a higher incidence of non-reporting of rape in the non-white community.[152]

### (ii) Age

It was found that the majority of the victims in the Toronto study were relatively young and between the ages of fourteen and twenty-four years of age (58.3 percent).[153] The data in the Toronto study revealed that there was an apparent bias against the _very_ young rape victim; only 30.6 percent of the victims between fourteen and nineteen years of age had their reports classified as "founded".[154] In many of these cases, the initial complaint to the police had been made by one of the parents of the young victim. The researchers felt that the police were likely to view such cases as parental interference with the child's sexual behaviour and not as _bona fide_ instances of rape, or, as cases where the victim had invented the rape to avoid parental discipline for consensual sexual intercourse. In many cases, where the police designated the case as "unfounded", the victim had had a history of truancy, had lived in foster or training homes, or had had a reputation for keeping company with undesirable juveniles.[155]

In the Vancouver study, Clark and Lewis found that the largest number of victims fell into the fourteen to nineteen year old category (representing 40.9 percent of victims). The next largest group was the twenty to twenty-four year old group. The group representing those between the ages of fourteen to twenty-four year olds represented 67.7 percent of reporting victims.[156] Clark and Lewis indicated that the age of the victim accounted for two further variables in police classification. They found that in Vancouver, up to the age of twenty-four, the younger the victim the greater the probability of a "founded" classification, and over twenty-four, the older the victim the greater the probability of an "unfounded" classification.[157] It appeared that younger women, especially those under fourteen years old, were regarded as the most credible rape victims, while women over twenty-five were regarded as less credible, and those between the ages of thirty and thirty-four were regarded as the least credible rape victims.[158]

This data cannot be viewed without further investigation of the marital status and occupation of the rape victims; it was generally understood that victims between the ages of fourteen and twenty-four, of solidly middle class backgrounds, were the most favoured victims by the system.

At the preliminary inquiry stage, the victims over thirty years old were decidedly under-represented among cases selected for Court. Once again it appeared that the younger the victim, the greater the probability that the case would go to Court, and the older the victim (over twenty-four years old) the greater the probability that it would not.

The researchers explained this phenomenon by stating that the common stereotype of the rape victim is a young virgin living with her parents. It is generally felt that unless an older woman, who is not a virgin, has been seriously injured during the rape, that no great harm has been done to her.[159]

In the report for the Advisory Council, it appeared that the victims were predominantly young; 53.1 percent of the victims were less than twenty years old, while only 14 percent of the victims were over thirty years old.[160] This may be explained by the fact that the victims of the study were those who had sought the assistance of a rape crisis centre, and as such may indicate that younger persons are more likely to turn to a rape crisis centre when the need arises.

In the Winnipeg project, it appeared that 46 percent of the sampling who indicated that they had been raped at one point in their lives were under the age of seventeen when the rape occurred.[161]

McCaldon indicated in his report that the majority of the victims were under the age of twenty years of age (73 percent). This study also included figures for rape of victims under the age of fourteen years. The most interesting thing to note about McCaldon's study was that he found no rape victims between the ages of twenty-six and forty years old, and only 9 percent of the victims fell within the category of twenty-one to twenty-five years old. Victims over the age of forty years old represented 18 percent of the victims.[162]

### (iii) Marital Status

Clark and Lewis concluded that the marital status of the victim was a factor in police classification of cases as "founded" and "unfounded". They found that the majority of rape victims were single (53.1 percent) and that an obvious bias worked against women who were separated, divorced, or living in common law relationships.[163] If a woman was divorced or separated it was more likely that her case would be classified as "unfounded". The bias against women living in common law relationships was even more visible. The bias based on marital status resulted in the low incidence or total absence of victims in the thirty to thirty-nine year old age group. The researchers concluded:

> The Canadian criminal justice system tends to dismiss those rape victims who, if of roughly marriageable age, are not living within the approved bonds of legal matrimony.[164]

The Vancouver study reinforced the findings of the Toronto report with respect to the marital status of the victim. The researchers concluded that a rape victim who was single and living at home with her parents was likely to find that her case would be classified as "founded" and in fact, there was twice as high a percentage of rape victims from this category in the "founded" category than those in the "unfounded/possibly founded" category. It was apparent that the most favoured cases by the system involved those of young, single women dependent upon their parents.

This trend was evident in the preliminary inquiry stage where the majority of cases involved single victims.[165]

The Winnipeg project revealed that 70 percent of the rape victims were single at the time of the rape, and that 49 percent were residing with their parents at the time of the rape.[166]

In the study prepared for the Advisory Council, the information revealed that 46.5 percent of the victims were "single-dependent" while 23 percent were "single-independent", 12 percent were married, 1.5 percent were living common law, and 17 percent were either separated, divorced or widowed.[167]

In McCaldon's article it was indicated that 78 percent of the victims were single, 18 percent were married, and 4 percent were separated.[168]

### (iv) Occupation

It appeared from the data in the Toronto project that the victim's occupation played a role in police classification. Professional women were the most likely to be believed by the police, for 100 percent of victims in this class had their cases classified as "founded".[169] Working women and retired women were also likely to be believed by the police; students and housewives did not fare as well. Only 50 percent of the students' cases were classified as "founded" and only 28.6 percent of cases involving housewives were classified as "founded". Those falling into the categories of unemployed, idle, on welfare, or prostitutes, were those least likely of all to be assisted by the police in investigating their cases.[170]

When combining the variables of age, marital status and occupation, Clark and Lewis found that the police were more likely to classify cases as "unfounded" if the victim was young, single, not living with her parents and unemployed.[171]

In the Vancouver study, it appeared that the largest number of victims were unemployed women and students. Generally, it was found that the police were more likely to classify a case as "founded" if the victim was a student or was employed, and were more inclined to designate a case as "unfounded" if the victim was unemployed, idle, a housewife, on welfare, or a prostitute. Again, a bias against women between the ages of fourteen and nineteen years old, not living at home, not at school, and not working, was evident in the police classification system. However, there was not as great a differential as in the Toronto study.[172] The researchers concluded;

> Thus, it seems clear that the most credible rape victims are women who are either students or who are gainfully employed in the work force in acceptable or respectable female occupations.[173]

This trend was evident in examining the cases which went to the preliminary inquiry stage.

In the report for the Advisory Council, data on the occupation of the victims was available only in a small number of cases, but it appeared that students represented the majority of the rape victims (62.9 percent). The rest of the rape victims were evenly distributed among other job classifications; however, it was noted that the professional and managerial categories were under-represented. The fact that the information was collected from rape crisis centres may be important in that it was suggested that women of the professional and managerial classes may have had access to other resources and may not have been inclined to contact a rape crisis centre.[174]

### (h) Timing of First Complaint

Clark and Lewis discovered that the interval of time between the occurrence of the rape and the victim's report of it was another factor which affected the classification by the police of the case as "founded" or "unfounded". The failure of a rape victim to report the crime at the first available opportunity cast doubt upon the credibility of the victim.[175]

In the Vancouver report, the researchers concluded that victims who did not report the crime immediately or who did not show extreme signs of distress when they did make the report, were less likely to be seen as credible witnesses. Research revealed that "the greater the length of time between the commission of the offence and the time of a first report, the greater the probability of an unfounded classification".[176] Generally, if the offence was reported within one hour it was likely to be "founded", and if reported after one hour it was likely to be "unfounded".

The length of time between the commission of the offence and the time of the first report was also a significant variable in determining the selection of cases for Court.[177] Of the cases at the preliminary inquiry stage, 90.9 percent were those involving reports made within one hour of the commission of the offence, while only 9.1 percent of the cases which reached this stage were cases where the first report had been made more than one hour after the commission of the offence. One can see that this was a highly significant variable throughout the system.

### (i) Appearance of Victim

In the Vancouver study, it was found that some police reports made mention of the victim's condition at the time of the report to the police. Where a victim showed signs of extreme emotional or physical distress, it was more likely that the case would be classified as "founded". The victim's mental state was also referred to in some police reports in the Toronto study. Where the victim appeared to be of dubious mental stability, for example, where the victim had a history of past mental illness and was under psychiatric care, the case was more likely to be classified as "unfounded".[178]

### (j) Medical Evidence

It was found in the Vancouver project that medical examinations were significant as a factor in the filtering of cases. Of all cases which went to the preliminary hearing stage, 74.5 percent were those involving victims who had had medical examinations. Cases where the victim had had a medical examination were encouraged to proceed through the system.

### (k) Number of Offenders Involved in Offence

In the Vancouver study, a significant variable in police classification was the number of offenders involved in the commission of the offence. It was more likely that the case would be classified as "founded" if more than one offender was involved in the commission of the crime.[179]

In the McCaldon study, the majority of rapists acted alone in committing the offence (79 percent). Twenty-one percent of the offenders committed group rape involving one to three accomplices.[180]

In the Gibson-Johnson study, it was found that 20 percent of the rapes involved more than one offender.[181]

## D. CONCLUSION

It was found generally that the rape victims were not always satisfied with the treatment they received from the medical profession. It was suggested that female doctors should be available for examinations, and that hospital staff be encouraged to be more sympathetic and supportive of rape victims. It was recommended that hospitals give higher priority to rape victims and standardize the tests and procedures to be followed to ensure that proper information was given to rape victims and that proper follow-up care was initiated. Also, it was suggested that victims be advised as to the availability of abortion in the cases of pregnancy, treatment of venereal disease, and psychiatric counselling if necessary.

With respect to the victim's perception of treatment received by the police, it was found generally that the police were supportive of the rape victims; however, it was recommended that the police be more respectful of women in "non-traditional" and less respectable lines of pursuit (unemployed, prostitutes, those on welfare). Some rape victims complained of being subjected to lie detector tests and of being subjected to other tests to determine their credibility as a witness. Such behaviour on the part of the police made the victims feel harassed.

The most crucial element in the police processing of a rape complaint was the classification by the police of "founded" and "unfounded" charges. The studies revealed that there was a definite bias in the police classification of rape cases; the designation of a case as "unfounded" did not necessarily imply that a rape had not occurred. It appeared that the police designated a case as "unfounded" because they felt that the case would not be successfully prosecuted at Court.

In reviewing the factors which influenced the police classification of cases as "founded" and "unfounded", a general profile emerged of women who, according to Clark and Lewis, "can't be raped". The researchers of the Toronto and Vancouver studies concluded that the major factor in the judgment made to proceed with a case or to terminate investigation was based upon the character of the reporting rape victim. If the victim was drunk when she was first interviewed by the police, if she was a runaway teenager who did not live at home and was unemployed, if she was between the ages of thirty and forty years of age and separated, divorced, or living in a common law relationship, or if she was "idle", unemployed or on welfare, or receiving psychiatric care, generally the police would not pursue the case. Further, if the victim was not hysterical when she reported the crime, or if she waited too long to report the crime, or if she knew the offender, or if she voluntarily accompanied the offender to his residence, or accepted a ride in his car, it was likely that the police would not designate the case as "founded". Where there was evidence of violence, especially where a weapon was used, or where other crimes were committed contemporaneously with the rape, or where more than one assailant was involved in the commission of the rape, the police were more inclined to pursue the investigation.

The factors which influenced the filtering of cases and the classification of "unfounded" and "founded" cases were based in part on the police perception of what cases would be successfully prosecuted. What evidence would be necessary to prove a case of rape in Court? Would a jury believe a woman who was drunk or on drugs at the time of the commission of the act? Would a woman with a history of mental illness make a credible witness? Would the fact that the woman had sustained a severe beating lend credence to her allegation of rape?

It has been said that the public's perception of a typical rape is that of a young, innocent virgin living at home with her parents. Essentially, the aforementioned filtering process, based upon an assessment of the character of the rape victim, reinforced this misperception.

The next portion of the paper dealing with the trial process will demonstrate the relationship between the factors involved in the filtering process and the trial process.

# PART THREE

## THE TRIAL PROCESS

### A. THE DOCTRINE OF RECENT COMPLAINT

There is a rule in common law which has been described from time to time as the rule against self-serving statements, self-confirmation or narrative. The rule states that in a criminal case, evidence that a witness has, on a previous occasion, made a statement consistent with his or her evidence at trial, is generally inadmissable. The principle behind the rule is that "evidence of a prior consistent statement is superfluous in a system that emphasizes oral testimony as the principal means of proving information before the trier of fact."[182] In addition, the rule has been developed out of concern for trial economy.

There are four principal exceptions to this general rule against self-serving statements, namely;

(i) Evidence of prior identification of the accused by an eyewitness;

(ii) Evidence of recent complaint by a victim in a sexual assault case;

(iii) Evidence offered in rebuttal of an allegation of recent fabrication or concoction; and

(iv) Evidence admitted as part of the res gestae.

Generally, the rule against self-serving statements would have excluded evidence of a rape victim's statement on a previous occasion; however, evidence of a complaint made by the victim shortly after a sexual assault, together with the particulars of the complaint, was admissible in evidence.[183] The complaint was not admitted as proof of the facts asserted, but was admitted to show the consistency of the complainant's testimony.[184] The rule was a remnant of the early common law requirement that a victim of a sexual assault was obliged to raise the "hue and cry", and her failure to do so was taken as a virtual self-contradiction of her story.

Thus, at common law, the evidence of the complaint was admissible to enable the jury to determine for themselves whether the conduct of a woman after the alleged attack was consistent with her testimony given at trial, and whether it affirmed that the acts complained of were against her will. In other words, was this the conduct the jury would expect of a truthful woman under the circumstances?[185] Historically, the Courts only allowed evidence of the fact that a complaint had been made and did not allow the witness to state what the content of the complaint had been. However, in 1896, the Court held in the case of R. v. Lillyman[186] that the particulars of the complaint were admissible in evidence.

## (1) PRINCIPLES OF THE DOCTRINE OF RECENT COMPLAINT

The principles applicable to the doctrine of evidence of recent complaint were recently enumerated in the case of Timm v. The Queen[187], as follows:

1. The basis for admissibility of evidence of recent complaint in cases of sexual assault is to negate the adverse inference arising from the victim's silence. It was thought that the true victim of a sexual offence would, under normal circumstances, complain at the first reasonable opportunity. A complaint for the purposes of this rule is a statement made by the victim, which, given the circumstances, will, if believed, be of some probative value in negating the adverse conclusion the jury could draw as regards the victim's credibility had she been silent.

2. Before admitting evidence of a recent complaint as evidence, the judge shall hold a voir dire to determine the following;

   (a) Whether there is some evidence, which, if believed by the jury, would constitute a complaint;

   (b) Whether the complaint was elicited by questions of a leading and inducing or intimidating character;

   (c) Whether the complaint was made at the first reasonable opportunity after the offence.

3. In determining whether there is some evidence, which if believed by the jury, would constitute a complaint, the trial judge must take into account evidence of the victim, if any, as well as that of the recipient of the complaint.

4. Evidence by a recipient of a complaint is admissible not only at the voir dire, but at the trial provided that the victim has testified as to the material facts to the commission of the offence, (whether or not she has also testified as to the complaint itself).

5. It is for the jury to determine what in fact the victim said and what probative value they attach to it.[188]

Thus, evidence of the fact that the victim has made a complaint and what was said were admissible in accordance with the doctrine of recent complaint only in the event that the applicable conditions precedent were established upon a voir dire. First, one had to establish evidence capable of constituting a "complaint". Second, the complaint must have been made at the first reasonable opportunity after the offence. (The reasonableness of the lapse of time between the offence and the complaint was an issue of fact to be determined on a case by case basis). Third, the complaint must not have been elicited by questions of a leading and inducing or intimidating character.[189]

The real significance of the doctrine of recent complaint was that where the Crown prosecutor failed to prove the making of a recent complaint by the complainant, a trial judge was required to instruct the jury that they could draw an adverse inference as to the truthfulness of her story.[190]

## (2) EVIDENTIARY VALUE OF THE RULE OF RECENT COMPLAINT

Upon a recent complaint being received into evidence in accordance with the principles set out in the Timm case, it was incumbent upon the trial judge, either at the time of the admission of the evidence of the recent complaint or in the charge to the jury at the end of the case, or both, to instruct the jury as to its limited evidentiary value.[191] The jury was told that evidence of a recent complaint was not admitted in proof of the truth of the matter asserted, but only as bearing upon the issue of the victim's credibility by showing consistency between the out of court statement and the trial testimony. "The evidence was of no probative value upon any fact in issue."[192] Evidence of the recent complaint served only to rebut the presumption against the victim which arose in the absence of a recent complaint.[193]

The cases dealing with the doctrine of recent complaint produced a considerable body of technical law which was criticized for its uncertainty.[194]

The issue of whether the complaint was elicited by questions of a leading and inducing or intimidating character was considered in the case of R. v. Moore and Grazier.[195] In this case, the two accused had taken a twenty-seven year old deaf mute woman from the street and had driven her about in their car for upwards of an hour during which time the sexual assaults were committed. While one of the accused was climbing from the back to the front seat, the victim jumped from the moving vehicle onto the highway, where she was found seriously injured shortly afterwards. She was nude from the waist down with her pants on the lower part of her legs. In her fall from the car, she suffered a fractured skull. Within forty-five minutes, a policeman had arrived at the hospital. In response to his question "Can you tell me what happened?", she wrote in part;

> ... they took and rough and silly to ask me date, but I don't want, but they hardly forced me to do. After that I must do something to go fast off car.[196]

The policeman then asked the question "Did the two boys try to take your clothes off or make advances towards you?"[197] Her response was "Yes, the boys forced to take and tried and then they do me." It was argued on appeal that the statement made by the victim from her hospital bed was wrongly admitted as evidence of a recent complaint, because it was elicited by questions of a "leading and inducing character". The British Columbia Court of Appeal held that the answers to the police officer's questions were rightly admitted as evidence of a recent complaint because, although the police officer's question was a leading question, it was only a request for clarification of information provided by the victim in her answer to the first question which clearly raised the issue of sexual advances.

The issue of leading and inducing questions was also dealt with in the case of R. v. Muise (No. 2).[198] In this case, the victim, a sixteen year old girl, had been picked up at a bus stop by the accused in his car. The accused allegedly struck the complainant on the head with a bottle to secure her co-operation and raped her. When her mother later asked her what had happened, she said that she had been hit over the head with a bottle thrown from a passing car. When her mother made a further inquiry, the daughter stated that she had been raped. The Nova Scotia Supreme Court, on appeal, stated that the complaint was properly admitted. Although the complainant had initially lied to her mother, she immediately followed the untrue statement with a complaint of sexual assault. The mother's inquiry was held to be not of such a nature as would render the complaint inadmissible. The Court held that questions which tend only to elicit the truth from a complainant are not objectionable.

In the case of R. v. Kulak,[199] the trial judge excluded evidence of a recent complaint. When the complainant had arrived home crying after the rape attack, her roommate had asked her if she had been raped. She answered in the affirmative and described the attack. Some time later, the victim then went to a church and told a priest about the rape. The trial judge excluded the first statement to the roommate as an answer to a leading question, but permitted the evidence of the complaint made to the priest. The Ontario Court of Appeal held that while a complaint elicited by questions of a leading or suggestive nature was not admissible, mere persuasion to account for an upset state did not render the resulting complaint inadmissible. Consequently, the Court held that the first statement made to the roommate was admissible, but that the second later statement made to the priest was not admissible for it was not made at the first reasonable opportunity.

The danger of asking the wrong question of a victim was outlined in the case of R. v. Waddell.[200] In this case, a complaint was made to a police officer who had arrived immediately upon the scene of the crime. The issue was whether the policeman had asked the victim if she had been raped or whether the victim had voluntarily stated that she had been raped. The British Columbia Court of Appeal held that a recent complaint, to be admissible, must be spontaneous and not induced by leading and suggestive questions. Where the police officer arrived upon a scene which was suggestive of an assault, the officer was held not to have induced the complainant's statement by asking whether she had been raped.

One can see from the above referenced cases that those who came into contact with rape victims immediately after the offence had to be cautious of the manner in which questions were asked of the victims to ensure that the evidence of recent complaint would be admissible at trial.

The requirement that the complaint be made at the first reasonable opportunity after the offence has been dealt with in a number of cases.

In the case of R. v. Taylor,[201] the complainant, after being raped, walked to a shopping mall nearly twenty minutes away from where the incident had taken place to tell a friend what had happened. It was argued on behalf of counsel for the accused that the evidence of recent complaint should not be admitted because the complainant should have stopped a passing car or gone into a home along the way to make her complaint. The Newfoundland Court of Appeal affirmed that this argument was without merit stating that it was quite reasonable for the victim to walk to the mall after the attack to locate her friend.

In the case of R. v. Belliveau,[202] the victim was allegedly raped at gunpoint between 7:00 and 8:00 p.m., after having accepted a ride in a truck from the accused. The victim testified that she persuaded the accused to take a ride with her girlfriend in another car back to town. She stated that she did not complain to the other occupants of this car that the accused had raped her because he had threatened to shoot them all if she said anything. The victim testified that she told her girlfriend at the first opportunity that she had been raped, and after driving together with the accused to a motel, told some people there that a man with a gun was after her. In this case, the trial judge failed to hold a voir dire to determine the admissibility of the complaint. In any event, the Nova Scotia Supreme Court, Appeal Division, held that only a complaint which was made at the first reasonable opportunity was admissible, and that second or subsequent complaints were inadmissible unless the latter complaints could be said to be part of the first in the sense that the events surrounding both formed a reasonable sequence of events in a "single continuous complaint". The Court held that it would have been open to the trial judge to find on a voir dire that the complaint made to the girlfriend was made at the first reasonable opportunity, but that her subsequent statements to the people in the motel would not have been admissible.

In general, once a voir dire had been held and the judge had decided that the recent complaint was admissible, the issue arose as to whether there was consistency between the complaint as testified to by the complainant and by the recipient of the complaint. Evidence of inconsistency in the statements often led to arguments that there was no complaint which could confirm the truth of the victim's story.[203] For instance, in the case of R. v. Shonias,[204] the victim testified that after being raped she had told her mother that she had been "beaten up" whereas the mother had testified that her daughter said that she had been raped. The Ontario Court of Appeal held that the statement was inadmissible as a recent complaint. In the case of R. v. Waddell,[205] however, the British Columbia Court of Appeal held that inconsistency between the complainant and the recipient of the complaint as to the substance of the recent complaint went to the weight of the evidence and not to the admissibility of the complaint itself.

The Supreme Court of Canada did not follow the Shonias decision in the case of R. v. Timm.[206] In this case, the rape victim testified that she had remembered only complaining to her sister that the accused had hurt her, although the sister testified that the victim had used the word "rape". At trial, the sister was not allowed to use the word "rape" in testifying as to the content of the recent complaint. The Supreme Court of Canada held that the fact that the victim did not remember what she said beyond her initial statement did not preclude the Crown from leading evidence of what in fact she had said. The Court held that the judge should have looked at the evidence of the victim as well as the evidence of the recipient, and should have allowed the sister to testify as to the particulars of the complaint at the trial. The Court stressed that what was of concern was the consistency of the conduct of the complainant at the time of the complaint with the testimony given by her at trial. It was stated that it would be misleading to deny the jury the evidence that a complaint of sorts had in fact been made, even though there was an inconsistency between the complainant's testimony and the recipient's testimony. As long as the evidence revealed that the conduct was consistent with the truth of the story of the offence itself, the evidence of the recent complaint was properly introduced.

The technical requirements of the doctrine of recent complaint and the adverse inference to be drawn by the failure of making a recent complaint have been criticized as being archaic and unfair.[207] Mr. Justice Belzil of the Alberta Court of Appeal, commented on this fact in the case of R. v. Timm;[208]

> To invite the jury to draw an adverse inference from lack of evidence of recent complaint is to revert to 'the perverted survival of the ancient requirement that a woman should make hue and cry as a preliminary to an appeal of rape' ... This 'ancient requirement' is not a principle of law but a medieval concept of the conduct to be expected in that era from a woman who claimed to have been ravished. It cannot be imposed on a modern jury. The jury must reach its conclusions on the basis of contemporary standards and concepts of which they, and not the trial judge, are deemed to be the best judges.[209]

The criticism of the recent complaint doctrine centered upon the rigid and technical rules which had been developed through the ages, as well as the negative inference to be drawn where the evidence of recent complaint was either not admissible or where a complaint had not been made. "Efforts by Crown counsel to offer evidence to explain why no 'recent' complaint had been made were met with mixed success."[210] As stated by P.K. McWilliams in his book Canadian Criminal Evidence;

> It is, moreover, open to criticism that there are many reasons why a female may not make a recent complaint. Complainants vary in age, experience, attitude, situation, and the facts of the case vary so that no general inference can or should be drawn as a matter of law. Not the least may be the appreciation of the victim that if she complained she would have to endure the ordeal of a trial in which she is to a real extent on trial and she might prefer to avoid this with the embarrassment and publicity.[211]

## (3) CONCLUSION

The doctrine of recent complaint was an aberration in the criminal law, for in most criminal cases the silence of the victim was an irrelevant issue. Indeed, the rule against self-serving statements prevented one from leading evidence of a prior statement. However, in a case of rape, if a victim did not make a complaint at the first opportunity, an adverse inference as to the credibility of the victim was drawn. A complex series of rules relating to the doctrine had been developed over the years. The complaint had to be recent and spontaneous. If some question arose as to the exact words spoken by the victim, the complaint could be held to be inadmissable. Thus, where no complaint was made, or if the complaint was not made quickly enough, or was induced, or where the jury found no "complaint" in law had been made, an adverse inference against the victim unnecessarily undermined her credibility at trial.

Critics of the anachronistic doctrine called for reform and the abolition of this special rule which frequently penalized the victims of rape.

## B. CORROBORATION

### (1) RAPE AND THE HISTORY OF THE WARNING RULE

At common law, the evidence of a single witness to a fact was sufficient, if believed, to establish the fact.[212] Consequently, the testimony of a single competent witness was sufficient in law to support a verdict. Within the last 100 years, by statute, and in part by judicial decision, a number of exceptions to this general rule have been created.[213]

The law developed special rules for certain types of witnesses thought to be inherently unreliable to the extent that their testimony could not safely be subjected to the ordinary rigours of jury scrutiny.[214] The classes of untrustworthy witnesses included;

1. Children of tender years, particularly when giving unsworn evidence ...;
2. Accomplices to the offence charged ...;
3. Victims of sexual offences, historically almost always women.[215]

The testimony of these witnesses required corroboration. These witnesses have been subjected to two variations of what has come to be known as the corroboration rules. The "mandatory rule" required that the corroboration exist before the case could be put to the jury on the evidence of only one witness.[216] Under this rule, the judge had to make a determination in law that the Crown had made a prima facie case against the accused, and also, that the case contained evidence that if believed, was capable of satisfying the technical rules for corroborating evidence. The judge had to instruct the jury not to convict unless evidence capable of corroborating the relevant facts was believed and was found to corroborate the victim's testimony.

The "warning rule" was the second version of the corroboration rule, which required a judge to warn the jury of the dangers of conviction on the basis of uncorroborated evidence.[217]

These rules are not unusual since historically, under the common law, much relevant evidence was excluded from trials out of a fear that the evidence might be fabricated and because of a lack of confidence in the jury's ability to evaluate the evidence. Convicts, parties to the action and interested persons to the action were all excluded from giving evidence at trial, and were considered unreliable or untrustworthy witnesses. Fortunately, this premise was rejected in the middle of the eighteenth century.[218]

The Criminal Code of 1892 enacted a rule making corroboration mandatory in respect of certain listed offences. These included, inter alia, offences of treason, perjury, forgery and offences involving the seduction, defilement and prostitution of Indian women.[219] The revision of the Criminal Code of 1927 added many new offences to the list of offences requiring corroboration. These included, among other things, the offences of seduction, procuring, carnal knowledge of idiots and deaf mutes, and communicating venereal disease.

Under the provisions of the Criminal Code of 1953-54, corroboration was mandatory in respect of most of the offences listed in the Criminal Code of 1927. This new Code included Section 134, which made corroboration discretionary in respect of other offences.[220] For the first time, there was enacted a rule of discretionary corroboration in respect of certain listed sexual offences. Section 134 of the 1953-54 Code became Section 142 in the Criminal Code of 1970. The relevant portion of the section read as follows:

> ... the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.[221]

On April 26th, 1976, Section 142 of the Criminal Code was repealed by the Criminal Law Amendment Act, 1975.[222]

What was the rationale behind the corroboration rule? Jeffrey G. Hoskins, in an article entitled "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases",[223] states that "[w]hile the rule requiring corroboration or at least a prescribed warning of the danger of convicting without corroborating evidence is a relatively recent development, the law has long held a deep suspicion of female complainants in sexual offence cases."[224] Hoskins reviews legal jurisprudence to support his proposition of the suspicion cast upon female witnesses. He quotes from Blackstone's Commentaries, published in 1769. Blackstone, an eminent legal scholar, commented upon the credibility of the rape victim as a competent witness. The issue of credibility of a witness must be left to the jury, he said, but certain factors were significant in determining credibility. In his opinion, the good reputation of the witness, the action taken by the witness after the offence, and whether the accused fled from the scene of the crime, were said to give greater probability to the victim's evidence. Reservations about the credibility of women witnesses in sexual matters, expressed by legal scholars, writers and legislators throughout the ages, played a major role in the development of our rape laws.[225]

Hoskins states that during the 1890s, legislation was enacted creating new offences to prevent the sexual exploitation of subordinate females by men in authority.[226] This action was an attempt by Parliament to deal with social problems which had grown out of the industrial revolution. Hoskins states that some Honourable Members of the House of Commons exhibited a "deep-seated mistrust of women, particularly working class women" during the Parliamentary debates on the legislation.[227] It appears that the Minister of Justice at the time, anticipating vigorous opposition to the passing of the legislation, had taken the precaution of requiring that there be corroborating evidence of the testimony of the accuser, and evidence of the previous chaste character of the accuser to prove the crime. Hoskins observed as follows;

> The introduction of the corroboration rule into Canadian criminal law was intended as a very special and unusual measure to protect the accused in special circumstances of perceived vulnerability. The requirement of corroboration was not intended to be one of general application but subsequently led to a more extensive rule than any of the participants in the 1890 debate could have foreseen.[228]

The Criminal Code imposed a requirement for corroborative evidence with respect to various offences created by statute. Sexual offences which originated in common law, such as rape and indecent assault, were not affected by a statutory requirement for corroborative evidence before 1955. Until that date, the Canadian Courts had followed the lead of the English Courts and developed what was termed a "rule of practice" with respect to these offences.[229]

In the 1925 case of R. v. Baskerville,[230] the Court of Criminal Appeal of Britain defined corroboration as independent evidence which connected the accused with the crime. It was said that the evidence had to implicate the accused by confirming in some "material particular" not only that the crime was committed, but also that the accused committed it. The test established in Baskerville became the standard and applied where corroboration was required as a matter of practice at common law, or where it was required by the Code.

In this decision, the English judiciary also decided that in any case where corroboration was required, a special jury instruction was necessary before a jury could consider the testimony of the witness in question alone without corroboration.

This principle was followed in the Canadian case of R. v. Jones,[231] where the Court held that the proper direction to the jury was that it was not safe to convict upon the uncorroborated testimony of the complainant, but that the jury, if they were satisfied of the truth of the complainant's evidence, could nevertheless convict.[232]

The 1927 case of R. v. Ellerton,[233] concerned an accused charged with rape, attempted rape and indecent assault. The Saskatchewan Court of Appeal held that it was the trial judge's duty to warn the jury that it was unsafe for them to convict the accused upon the uncorroborated evidence of the complainant, and having so warned them, it was his further duty to tell them whether or not they had before them any evidence, apart from the complainant's own story, which they might accept as corroboration. The Court indicated that the warning rule was a "rule of practice" well established at common law and therefore binding upon Canadian Courts.

In the 1930 case of R. v. Mudge,[234] the Saskatchewan Court of Appeal went even further and stated that putting the evidence of a complainant on the same footing as an ordinary witness amounted to a miscarriage of justice.

Hoskins commented upon the development of the warning rule in Canada as follows;

> Although the corroboration rule had attained strength in some Canadian jurisdictions, this was not immediately the case across the country. Doubt as to the very existence of the rule lingered until relatively late in its development.[235]

Subsequently, what had been a "rule of practice" in some Courts across Canada became entrenched as a rule of law when Parliament chose to codify the warning rule as part of the major revision of the Criminal Code in 1955. In order to understand the rationale behind the codification of the warning rule, Hoskins studied the Parliamentary Debates of the House of Commons during that period. He noted that the legislators moved away from concern that the accused not be convicted upon the evidence of only one witness in favour of creating suspicion based upon the witness' gender. The general belief appeared to be that a "woman complaining of a sexual offence against herself was untrustworthy per se."[236] However, no such corroboration was required for the offences against men such as buggery, indecent assault on a male and gross indecency. Hoskins spoke of the "deep-seated suspicion of women" clearly expressed by members of the House of Commons at the time. In particular, The Honourable John Diefenbaker, as he then was, voiced his concern about complainants with "feelings of revenge" or other motives having an easy way to punish men by laying "ill-founded" indecent assault charges.[237] The future Prime Minister also stated that the warning rule had developed over the years to protect innocent men from blackmail. Apparently, he erroneously believed that the warning rule had been in effect in Canada since 1870.[238]

In conclusion, Hoskins summarized with respect to the warning rule as follows;

> While a judge might properly warn a jury of particular difficulties where a case amounted to a simple question of the accuser's word against that of the accused, the notion that corroboration was required because of the nature of the offence was introduced in the late nineteeth century with legislation intended to protect women threatened sexually as a result of the changing social and economic conditions associated with industrialism. Stiff political opposition to the measures resulted in special protections for the accused, including the requirement of corroboration.[239]

The statutory mandatory rule for corroboration first enacted in the 1890's never affected the common law offences of rape, attempted rape and indecent assault on a female; a companion rule requiring a warning, at least in the case of rape, developed through the case law to greatly discourage conviction in the absence of corroboration. The rule developed after the statutory rules were enacted, and was largely derivative of them.[240]

## (2) ELEMENTS OF CORROBORATION

The "rule of practice" set forth in Baskerville was approved by the Supreme Court of Canada in the case of Thomas v. The Queen.[241] Canadian jurisprudence accepted that the two over-riding characteristics or attributes of corrorborative evidence were:

1. Independence - in that evidence must emanate from some source other than the witness, whose testimony is to be corroborated; and

2. Materiality - in that the essential elements of the offence must be corroborated.[242]

Furthermore, the evidence must also confirm that a crime has been committed, and that it was the accused who committed it. There must be corroboration in the two separate areas, namely that of the commission of the crime and that of the prisoner's identity or connection with the commission of the crime.[243] Where there was more than one accused, there must be corroboration as to each accused. However, corroborative evidence itself did not have to be substantiated by other evidence, nor could a witness corroborate his or her own evidence.

In an article entitled "Corroboration",[244] the Honourable A.E. Branca, then of the Court of Appeal for the Province of British Columbia, discussed in great detail the elements of corroboration, under the following headings:

(a) Independent Evidence
(b) Circumstantial Evidence
(c) Facts To Which Complainant Has Testified
(d) Material Particular
(e) More Than Mere Possibility
(f) Silence Of Accused
(g) Failure To Testify
(h) False Statements
(i) Opportunity And Motive
(j) Inadmissible Statements
(k) Conduct Of Accused
(l) Torn Clothing, Bruises Or Other Injury
(m) Distressed Condition Of The Complainant
(n) Medical Evidence
(o) Evidence Of Gonorrhea

These factors are discussed below in more detail.

### (a) Independent Evidence

The first element discussed was the requirement that corroborative evidence be independent. The leading case in Canada at that time was Hubin v. The King,[245] a case involving a charge of carnal knowledge of a girl under the age of fourteen years. Corroboration was required by the Canadian Criminal Code.

The case involved a child who had accepted a ride with the accused, who then apparently raped her in his car. The child noted the licence plate number of the car and then went home and told her older sister of the attack. The child was able to identify the accused from a line-up at the police station, and provided the police with the car licence number. Later, she was able to identify the car belonging to the accused, and described a peculiar shaped and coloured cushion which had been in the back of the car. The accused had made several conflicting statements to the police about his whereabouts at the crucial time, but admitted ownership of the car in question. At trial, the judge held that the evidence of a salesman as to the ownership of the car and the admission by the accused of the ownership of the car corroborated the testimony of the girl in a material particular. The issue on appeal was whether or not this evidence was independent evidence which corroborated the story of the complainant.

The Court of Appeal held that there was no independent testimony which connected the accused with the crime. On a further appeal, the Supreme Court of Canada set aside the conviction and ordered a new trial. In doing so, the Supreme Court held;

> While the verification of the details given by her no doubt adds to the credibility of the story she tells, everything in that connection, including the admitted facts of ownership and driving ... depends for its evidentiary value upon her statement that a certain licence number was that carried by the car in which she was conveyed to the scene of the crime and her subsequent identification of a cushion found in a car bearing that number. This is not, in a proper sense, independent evidence tending to connect the accused with the crime. In themselves, these facts and circumstances merely relate to the identity of the accused without connecting him with the crime ...[246]

In conclusion, the Supreme Court held that the evidence provided was not of an independent character which tended to connect the accused with the crime, but related only to the identity of the accused and did not therefore satisfy the rule enunciated in the Baskerville case. The Court noted that the conduct of the accused when arrested as well as the two inconsistent statements made by him to the police might well have provided legal corroboration of the young girl's story had such evidence been directed by the trial judge to the jury.

In this article, Branca concluded;

> It will be seen, therefore, that evidence which only confirms the credibility of the complainant's narrative but which does not connect the accused with the crime in the sense that he is the person who committed the crime does not fulfill the requirements of corroboration.[247]

The case of Thomas v. The Queen,[248] provides another example of the rule's application. A woman returned home and told her husband that she had been raped. The husband later testified as to his wife's distress, her dishevelled appearance, scratches on her body and the fact that her throat was very red. The complainant had indicated that the accused had attempted to strangle her during the commission of the offence. The accused at first denied having had any contact with the complainant, and then admitted the intercourse but relied upon the defence of consent. Corroborative evidence was required on the issue of consent. The accused was convicted at trial. The Ontario Court of Appeal upheld the conviction.

On appeal to the Supreme Court of Canada, it was held that the trial judge had failed to explain the need for corroborative evidence properly to the jury. The Court held that the trial judge was under a duty to define corroboration in accordance with the rules laid down in the Baskerville case, explaining to the jury that:

(i) The evidence offered by way of corroboration must emanate from an independent source other than the witness, and that the evidence must relate to the question of consent;

(ii) That the facts, even if independently established, could not amount to corroboration if the evidence was equally consistent with the truth as with the falsity of the witness' narrative on the question of consent; and

(iii) The evidence of the making of a complaint by the victim and the complaint itself cannot corroborate the substantive evidence of the witness for it does not come from an independent source.

The Supreme Court of Canada held that it was the duty of the judge, when there was any evidence upon which a jury could find corroboration, to direct the jury as to what was necessary to constitute corroboration. It was then for the jury to say whether corroborating inferences should be drawn. In this instance, a new trial was ordered.

### (b) Circumstantial Evidence

In the Baskerville case it was also held that corroboration could be provided by circumstantial evidence. If the totality of the circumstances showed or tended to show that the crime had been committed and that the accused had committed it, it would suffice as corroborative evidence.[249]

In the 1959 case of R. v. Ethier[250] the complainant testified that she had accepted a ride with the accused, and had been raped in his car. She complained to her parents, gave them the name of the accused and the licence plate number of his car, as well as the year and make of the car. She stated that she had made footprints on the ceiling of the car while struggling with the accused, and had noted that the interior door handle was missing. There were also stains on her clothing and on the clothing of the accused. The accused relied upon an alibi defence. The trial judge held that corroboration could be found in the circumstantial evidence of human blood, a hair sample, the fact that the accused's car had a missing car handle, the evidence relating to the clothing of the accused, the licence plate number and the emotional state of the victim upon her arrival at home. All this evidence, circumstantial as it was, corroborated the victim's story in all respects.

However, the Court of Appeal held that two areas, both the commission of the crime as well as the identity of the accused, had to be corroborated. The Court held that there was no corroborative evidence as to the identity of the accused, for the evidence submitted was equally consistent with the truth as with the falsity of the victim's story. Consequently, although there was corroborative evidence of the fact of the commission of the act, there was no independent corroborative evidence linking the accused to the offence.

### (c) Fact To Which Complainant Has Testified

Another rule devised by the Courts in determining what constituted corroborative evidence was the rule that the corroborative evidence had to relate to the actual facts related by the complainant in her testimony. In the 1944 case of McIntyre v. The King,[251] the complainant had testified that she had been raped by the accused in an open field. She identified the location where the act occurred, but made no comment as to its condition. An independent witness testified that he arrived at the scene where the alleged act had occurred and noted that the grass had been beaten down. In response, the accused testified that the grass was beaten down when he arrived at the scene.

The Supreme Court of Canada held that it was a misdirection for the trial judge to say that evidence of the matted down condition of the grass after the occurrence of the alleged rape could constitute corroboration of a material aspect of the complainant's story, for she had not testified as to this fact herself.[252] The conviction was set aside and a new trial was ordered.

### (d) Material Particular

The Supreme Court of Alberta, Appeal Division, in the case of R. v. Magdall,[253] held that although corroboration was required, all the essential elements of the offence did not have to be corroborated. It would be sufficient if there was confirmation of a "material particular" of the crime, provided such corroboration satisfied the Court or jury of the truthfulness of the witness. This case involved the offence of seduction under promise of marriage. The Court held that either but not both of the two "material particulars" of the crime - the seduction and illicit intercourse, or the promise of marriage - had to be corroborated. The Court stated;

> The fact that a witness is corroborated in respect of any one material statement of fact has a tendency to induce belief in his uncorroborated statements and if corroboration in one material respect, in fact, satisfied a Court or jury of the truthfulness of the witness, in other respects, that was held by this Court to be sufficient corroboration in law ...[254]

### (e) More Than Mere Possibility

In terms of the onus of proof in such cases, the Supreme Court of Canada held in 1946 in MacDonald v. The King[255] that corroboration must not be so meagre as to create a mere possibility that the accused committed the crime, but should be strong enough to convince the jury of the probability of the truth of that fact. Further, it was held that corroborative evidence need not be conclusive. It was sufficient if the facts were independently proven and were consistent in intending to show that the accused was guilty.

### (f) Silence Of Accused

In certain circumstances, the conduct and statements of the accused may be tendered as evidence to corroborate the victim's story. Indeed, the issue has arisen frequently as to whether or not the silence of an accused person, when placed in a position of confrontation, may constitute corroborative evidence. Generally, only when an accused accepts a statement as his own can it be used as evidence against him.[256]

In the leading case of The King v. Christie[257] the alleged offender was accused of a sexual assault against a young boy. The evidence revealed that after the alleged offence the boy, in the presence of his mother, had pointed to the man and had stated "That is the man", to which the accused had replied "I am innocent". The House of Lords held as a general rule that an accused may, by conduct or demeanour, or by his own words, or by inferences drawn by his answer, accept or reject the truth of a statement made in his presence. Consequently, where the truth of the statement has been accepted by the accused, the statement may be used against him.

However, it should be underlined that one cannot use the accused's silence to infer guilt. In the case of R. v. Sigmund, Howe, Defend and Curry[258] the British Columbia Court of Appeal held that silence in the face of a charge or statement only becomes an admission of truth when in the circumstances there is duty to speak or where a person might reasonably be expected to do so. For instance, in the case of R. v. Fargnoli,[259] an accused was charged with sexual offences against his daughter. The accused, after being arrested, questioned and charged, said "You got it all there, there is nothing more to say.". The Court held that one would, in these circumstances, expect a denial by the accused of the charge, and therefore, the words stated by the accused could reasonably imply that the accused acknowledged the truth of the allegations.

## (g) Failure To Testify

The Courts have held, as in the case of R. v. Auger,[260] that the failure of the accused to testify during the trial does not constitute corroboration, for silence, except in circumstances which imply assent, is not evidence.

## (h) False Statements

Whether false statements by the accused can constitute corroboration depends on the facts of the case, but generally, the behaviour of the accused, including his contradictory and untrue statements, are questions of fact from which a jury may properly infer corroboration of the victim's allegations.

An important decision in this area is the case of White v. The Queen.[261] In this case, the accused was convicted of having sexual intercourse with his niece, a girl under the age of fourteen years. The accused had made two false statements to the police; one, that he had not had an opportunity to commit the offence, and two, that he had been impotent for years. Both statements were material facts which afforded a complete defence to the charge. Evidence was led to contradict both statements. The Court held that the nature of the false statements and the circumstances in which they had been made amounted to corroboration of the complainant's evidence.

To establish corroboration from an accused's false statements, one must show the following:

(i) That the false statements are made with respect to material facts in issue;

(ii) That the false statements are made by the accused with the full knowledge of the identity of the person who made the complaint, and the nature of the charge against him; and

(iii) That the false statements are made with an intent to escape conviction.[262]

### (i) Opportunity And Motive

A number of reported decisions have held that it is not sufficient to show that it was merely possible that the accused could have committed the act. The evidence must show that the commission of the act was probable. Thus, in the leading case of Burbury v. Jackson,[263] a case where a man was accused of being the putative father of the complainant's child, evidence that both the accused and the complainant worked for the same employer, and both on occasion found themselves in the barn doing their chores, was insufficient to corroborate the complainant's evidence that the accused and she had had sexual relations in the barn. The Court stated that evidence of opportunity alone could not amount to corroboration. Although the evidence suggested fatherhood was possible, it did not make it probable.

Further, in the Canadian case of R. v. Beddoes,[264] the Court held that the conduct of the accused taken altogether must be considered by the jury. However, there must be proof of facts which warrant an inference of guilt independent of the accused's acts.[265]

### (j) Inadmissible Statements

Where the statements of the accused are held to be inadmissible, for instance, where the Crown fails to prove the statement has been made freely and voluntarily, the Court cannot rely upon the statements to corroborate the complainant's evidence as in the case of R. v. Newes.[266]

### (k) Conduct Of The Accused

It was held by the Court in R. v. Bondy[267] that the jury might infer from the accused's flight from the jurisdiction after arrest an acknowledgement of guilt and treat this fact as corroboration.

In the case of R. v. Hubin[268] the Court had stated that the conduct of the accused when arrested and when identified by the complainant could amount to corroboration of the complainant's story where the accused had first chosen to remain silent and then made two conflicting statements to the police regarding his involvement with the complainant.

### (l) Torn Clothing, Bruises Or Other Injury

In an article entitled "Corroboration" by C.C. Savage,[269] it was noted that evidence of torn clothing of the complainant and bruises found upon her body may constitute corroboration of her testimony, as held, for example, in the case of R. v. Lastikawa.[270] However, such evidence does not always constitute corroboration. The cases on the subject have been decided according to their particular facts. Arthur Maloney, in his article, also entitled "Corroboration",[271] explained the rationale behind the Court's reluctance in some cases to accept evidence of torn clothing and injuries to the victim as corroborating an allegation of rape, as a fear of the victim manufacturing evidence by tearing her clothes or inflicting injury to herself to support a false claim of rape. He opined;

> It seems unlikely that a woman would inflict serious injuries upon herself in order to bolster her story and in such a case evidence of such injuries might well be corroborative of the complainant's testimony. If she did consent to the act it is improbable that a girl would ruin a very valuable article of clothing or of jewelery in order to substantiate a false story that she had been raped. But, on the other hand, minor scratches or small tears or dishevelled appearance should be looked upon with suspicion and should not be acted upon as corroborative.[272]

His comments underline the suspicion with which the complainant was viewed.

### (m) Distressed Condition Of The Complainant

In some instances it has been held that evidence as to the distressed condition of the complainant can be tendered to corroborate the complainant's testimony.

In the 1962 English case of R. v. Redpath,[273] the Court held that evidence as to the condition of the complainant is not always capable of amounting to corroboration, for, the Court said, the complainant might put on an act and simulate distress. In this particular case, where a young girl of seven was indecently assaulted, evidence was led to establish that the girl had been observed at the scene of the crime in a very distressed condition. It appeared that the girl did not know that her actions were being observed at the time, and therefore the Court was satisfied that the seven year old was acting honestly.

### (n) Medical Evidence

Again depending upon the facts of the case, medical evidence substantiating that sexual intercourse has occurred may or may not amount to corroboration. The cases have also held that medical evidence of injuries to the sexual organs may in some circumstances amount to corroboration.[274]

### (o) Evidence Of Gonorrhea

Where the accused and the victim are shown to be suffering from a particular strain of gonorrhea, this fact may amount to corroboration. This was the finding of the Court in the case of R. v. Jones[275] which involved the indecent assault on a little girl who was found to be suffering from gonorrhea as a result of the assault by the accused.

## (3) CORROBORATION AND THE ROLE OF THE JUDGE AND JURY

Another technical aspect of the corroboration rule involved the function of the judge and jury. This aspect shall be dealt with under the following headings:

(a) What A Trial Judge Had To Tell The Jury
(b) What A Trial Judge Could Tell the Jury
(c) What A Trial Judge Could Not Tell the Jury
(d) The Function of a Judge Sitting Alone
(e) The Role of the Appellate Court

### (a) What A Trial Judge Had to Tell the Jury

Generally, it was a question of law as to whether or not there was any evidence which could be corroborative. This question was resolved by the trial judge, who considered whether or not there was evidence which bore the characteristics of corroboration. If he decided there was no evidence, he directed the jury accordingly. Alternatively, if he decided there was, he determined which parts of the evidence could be considered corroborative and brought these to the attention of the jury, directing the jury to determine whether or not the evidence had corroborative characteristics.[276]

It was also incumbent upon the judge to define corroboration for the jury. Indeed, in the case of Thomas v. The Queen,[277] it was held to be a fatal error for the trial judge to fail to properly define corroboration. The Thomas case, referred to previously, dealt with a charge of rape to which the accused relied upon consent as a defence. The Supreme Court of Canada held that there was some evidence capable in law of amounting to corroboration if the jury had seen fit to regard it as such. The duty of the trial judge was defined in that case as follows;

> It is the duty of the judge in a case of this sort where there is any evidence on which the jury could find corroboration, to direct the jury as to what is necessary to constitute corroboration and it is then for the jury to say whether corroborative inferences should be drawn. The duty of the judge was to inform the jury that corroboration must be independent of the testimony of the complainant and must tend to show that her evidence with respect to the issue in argument was true and also that the facts could not amount to corroboration if they were equally consistent with the truth as with the falsity of her story.[278]

The Courts have also held that it is incumbent upon the trial judge, where the corroborative evidence is circumstantial, to explain to the jury that the circumstantial evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable conclusion. This principle was enunciated in the case of Simpson v. The Queen.[279]

With respect to evidence of recent complaint in a charge of rape, the cases have held that the trial judge has a duty to instruct the jury that they must not regard it as being corroborative of the testimony of the complainant.[280]

Moreover, it was held to be a duty of the trial judge to bring to the attention of the jury the fact that no corroborative evidence exists as held in the case of R. v. Mudge.[281]

Arthur Maloney stated that there was also authority for the proposition that "the slighter the corroboration the more emphatic the judge's warning on it should be."[282]

### (b) What A Trial Judge Could Tell The Jury

According to the Baskerville case, the trial judge has the total discretion to advise the jury that they ought not to convict an accused on the basis of uncorroborated evidence.[283]

### (c) What A Trial Judge Could Not Tell The Jury

The trial judge could not instruct the jury that if they were satisfied that the uncorroborated evidence was true, that they ought to convict the accused.[284]

As noted in the case of R. v. Mudge it was held that an instruction to the jury putting the complainant on the same footing as an ordinary witness was actually a misdirection amounting to a miscarriage of justice.[285]

It was the function of the trial judge to determine what evidence as a matter of law might be considered as corroborative, and the function of the jury to determine, as a matter of fact, whether that evidence did in fact corroborate the testimony which required corroboration.

It is a misdirection for the trial judge to instruct the jury that a particular piece of evidence is corroboration, for the trial judge might only say that the evidence may be corroborative.[286]

### (d) The Function Of A Judge Sitting Alone

In cases where a trial judge sat without a jury, the judge had to consider whether or not there was any corroborative evidence and direct himself as to the danger of convicting the accused in the absence of such corroboration. There is a general legal presumption that a trial judge knows the rules of law. As such, there is no requirement that the judge give expression to the rules of law when delivering a judgment. The Appeal Courts will not overturn the decision of a trial judge, unless an error is apparent in the trial judge's reasons.

By way of example, in the case of Kolnberger v. The Queen,[287] the complainant, a woman, while waiting for a bus, accepted an offer of a ride home by a stranger. She was physically and sexually assaulted and then forced from the stranger's car. The accused did not testify at trial, nor was any evidence called on his behalf. The evidence of the complainant was uncorroborated. The Supreme Court of Canada held that from a reading of the record, it appeared that the trial judge was in some doubt that he had to apply the sections of the Criminal Code dealing with corroboration to the issues of identity and the commission of the assault. The Court held that the trial judge had to instruct himself in accordance with the Criminal Code, not only as to the fact of the rape but also to the matter of identity. It appeared that the judge had concluded that corroboration was not necessary on the question of identity, or in the alternative, that he was satisfied beyond a reasonable doubt that the complainant's story regarding the identification of the accused was true from the fact that the accused offered no explanation or contradiction. This was held by the Supreme Court of Canada to be a fatal error, and a new trial was ordered, on the basis that the learned trial judge had erred in law and had misdirected himself as to the burden of proof. The trial judge's reference to the fact that the accused had not tendered evidence lead the Supreme Court to find that he had not been satisfied beyond a reasonable doubt that the complainant's evidence was true, but convicted the accused partly because the accused had not testified.

### (e) The Role Of The Appellate Court

Arthur Maloney, in his article on corroboration, described the position of the appellate court regarding the issue of corroboration. Where, for instance, the trial judge instructed the jury that certain evidence could be corroborative when the appellate court finds that such evidence is not corroborative, the error is remedied by allowing an appeal.[288]

Where, however, a judge, sitting without a jury, found corroboration where in law there was no corroboration, a court of appeal may rectify the error by setting aside the conviction.

Where the trial judge misdirected the jury as to the matter of corroboration, and in fact overlooked other corroborative evidence as indicated on the record, the appellate court set aside the conviction and ordered a new trial, as in the case of Hubin v. The King.[289]

Where the jury was properly warned as to the danger of acting on uncorroborated evidence, in a case where there was no evidence capable in law of being corroboration, and the jury nevertheless convicts the accused, the appellate court could allow an appeal and quash the conviction if the court thought that the verdict was unreasonable. This principle is supported by the Baskerville case and was followed in the case of R. v. Lovering.[290]

In some circumstances, a conviction has been upheld notwithstanding that the trial judge referred to evidence which, in the opinion of the appellate court, would not amount to corroboration where there was a wealth of corroborative evidence to which the trial judge did not refer.[291]

## (4) RATIONALE OF THE CORROBORATION RULE IN RAPE CASES

The issue of the requirement for corroboration in sexual offences is discussed in an article by Neil Brooks entitled "Rape and the Laws of Evidence".[292] He stated that the rape victim probably and understandably wondered why her testimony should be treated any differently than a victim's testimony in most other offences. Why were women in sexual assault cases branded as inherently untrustworthy? Over the years, a number of justifications for the mandatory caution to the jury have been advanced by the Courts and legal writers. Brooks reviews these theories under the following headings:

(a) Fear Of False Charges
(b) Jury Misled By Complainant
(c) Fear Of Outrage
(d) Difficult Charge To Defend
(e) Severe Penalty

### (a) Fear Of False Charges

It was alleged that false accusations of rape are more frequent than false charges of other crimes. Women were said to accuse innocent men of rape for a number of reasons;

- to protect her name or reputation in the event that the fact of her having intercourse with the accused became known;
- out of feelings of shame or bitterness towards her partner;
- because she suffered from a neurotic desire to call attention to herself;
- because she wished to obtain revenge on a man who rejected her for another;
- blackmail.[293]

This theme appears again and again throughout the history of rape laws. In the seventeenth century, Lord Matthew Hale had stated that rape was an accusation easily made and hard to prove; this statement has been cited as the primary rationale for the corroboration requirement in sexual offence cases.[294]

In an article entitled "A Comparative Study of Canadian and American Rape Law"[295], Constance Backhouse criticised this rationale and stated that rape was the most under-reported of all violent crimes with estimated reporting rates ranging from 20 to 40 percent."[296] In her view, the fallacy of Lord Hale's remarks was further proved by statistics which showed that rape was one of the easiest charges to defend against. She stated;

> The fear that innocent men will be convicted of rape has led the legal system to develop a number of safeguards, including the requirement of corroboration. The result has been that rape has the lowest conviction rape of any violent crime.[297]

In support of her statement she quoted from Statistics Canada which showed conviction rates for Canada in 1973, for all crimes against the person to be 66.7 percent, while the conviction rate for rape was 39.3 percent.[298]

Two twentieth century legal writers have also supported the corroboration requirement for sexual offences - Glanville

Williams and John Henry Wigmore. Professor Wigmore felt that the psychic complexes of women and girls were "multifarious and distorted", while Glanville Williams stated that women deliberately brought false charges against men out of sexual neurosis, fantasy, jealousy and spite. The two learned writers have been credited with the very existence of the corroboration rule.[299] Both scholars suggested that the female complainant's social history and mental makeup should be examined and testified to by a psychiatrist at trial, or in the alternative, that the complainant be subjected to a polygraph or lie detector test.[300]

### (b) Jury Misled By Complainant

The second argument in favour of the corroboration rule was that a jury might be misled by the testimony of the complainant. It was feared that a jury would fail to understand the many motives or reasons which lead women to give false evidence about being raped.[301]

### (c) Fear Of Outrage

Many legal writers expressed fear that a jury, feeling outraged by the nature of the sexual offence and sympathy towards the victim, would convict the accused without being persuaded of his guilt beyond a reasonable doubt.

### (d) Difficult Charge To Defend

It was also alleged that the defence would lack evidence in supporting its side of the story, it often being the accused's word against the victim's.[302]

### (e) Severe Penalty

Another justification for the corroboration requirement was the severe penalty the accused could face upon conviction and the possible damage to a man's reputation and livelihood as a result of a mere accusation of rape.

## (5) EMPIRICAL STUDIES OF THE CORROBORATION RULE

Was there any basis for the theories behind the corroboration requirement? Hoskins reviewed the empirical studies examining the effect of corroboration rules on jurors. The most frequently cited American study was done by Harry Calven and Hans Zeisel, entitled The American Jury.[303] This study found that rather than showing sympathy for rape victims, jurors showed a marked sympathy for the accused, especially where the jurors felt that the female complainant contributed in some way to her own misfortune. The study also revealed that not only did the average juror follow and understand the evidence as well as the judge, but that the jurors and judge did not disagree significantly in determinations involving the credibility of witnesses. The criticism about jurors not being sophisticated enough to understand the psyche of witnesses and being unable to assess and evaluate the testimony of certain witnesses appeared to be without basis.[304]

Hoskins discussed a British experiment which found that the corroboration warning actually worked against the accused. The results of the experiment found that more juries convicted when the warning was given than when it was not.[305]

In Canada, Valerie P. Hans and Neil Brooks conducted a similar experiment with a mock jury and concluded that the corroboration warning encouraged the jurors to spend less time discussing the credibility of both the accused and the complainant. The researchers felt that discussion of the evidence was inhibited by the giving of a full warning.[306]

Furthermore, another Canadian experiment conducted by Susan Hess Nelson found that only 64 percent of jurors understood a straightforward instruction on corroboration.[307]

### (6) CRITICISM OF THE CORROBORATION RULE

Having reviewed the intricate rules of corroboration one need not wonder why opponents to the rule began to voice their concerns. As stated by the Law Reform Commission in their study on Evidence;

> Aside from the likely false assumptions upon which our present rules of corroboration rest, the futility of estimating the credit of a proposed witness simply by placing him in a broad category, and the dangers of a strict corroboration requirement, a case for the abolition of the present rules can be supported by their sheer complexity. The rules have provided a fertile field for technical appeals of questionable merit.[308]

The view that the corroboration requirement is unnecessary and discriminatory against rape victims has gained prominence and has led to both Canadian and U.S. reform in recent years.[309]

It is interesting to note that the State of New York in 1967 enacted a mandatory corroboration rule affecting rape and other sexual offences requiring that the testimony of the victim be corroborated with respect to every element of the offence alleged.[310] As a result of the 1967 enactment, convictions for rape were virtually impossible to obtain. The conviction rate for rape in New York was about one-tenth of that of the national average. Understandably, there was widespread public outcry and the law was repealed in 1974.[311]

Aside from the criticism of the excessively technical nature of the corroboration rule, the rationale behind the rule has also been criticised as being anachronistic.[312]

Constance B. Backhouse has commented on this point as follows;

> In Lord Hale's time, the accused had neither the right to counsel, nor the right to compel witnesses in his defence. Innocence was not presumed and guilt was not required to be proven beyond a reasonable doubt. A cautious approach may have been reasonable in the seventeenth century, but 300 years of changes in criminal procedure have 'sapped the instruction of its contemporary validity'.(F.B.I. Uniform Crime Report, 1973)[313]

The Law Reform Commission of Canada recommended abolition of all corroboration requirements and generally criticised the rule as being overly technical and outdated. The Commission stated;

> ... we have moved from a wise practice of viewing the evidence of some witnesses with circumspection to a complex technical rule filled with pitfalls for the unwary. It is beyond the dimensions of this paper to fully illustrate the enormous superstructure that has been erected on the original basic proposition that the evidence of some witnesses should be approached with caution. A thorough reading of any of the Canadian articles in this area will reveal the subtleties, variations, inconsistencies and great complexities that have emerged from the case law in this area.[314]

## (7) REFORM - REPEAL OF SECTION 142: MANDATORY WARNING RULE

In 1975 the discretionary warning provision, then Section 142 of the Criminal Code, was repealed. The mandatory rule contained in Section 139 was left untouched and continued to apply to certain sexual offences.

The repeal of Section 142 created some judicial confusion because Parliament did not indicate what rule, if any, was to substitute for the warning rule. The Ontario Court of

Appeal in the case of R. v. Camp[315] resolved the debate, and stated that with the repeal of Section 142, it was no longer a rule of law that it was dangerous to convict an accused of rape on uncorroborated evidence of the complainant. An instruction to the jury in the terms of the former Section 142 was no longer appropriate. Mr. Justice Dubin of the Court of Appeal criticised the mandatory warning rule, and stated;

> It arbitrarily cast doubt on the credibility of all complainants who were giving evidence in the trial of all the offences specified, even where no basis for such doubt fairly arose on the evidence.[316]

He stated that it was no longer the law that a jury must be instructed with respect to those offences enumerated in the former Section 142 in the language prescribed therein, and stated that "a trial judge ought not to do so."[317] He went on to say, however, that the repeal of Section 142 did not limit the trial judge's well-established right and duty in appropriate cases to comment on the evidence and to assist the jury as to the weight that should be given to the evidence. A trial judge may warn the jury of the danger of convicting an accused on the evidence of a single witness, but a judge ought not to resort to the term "corroboration".[318]

In reviewing the charge to the jury given by the trial judge, the Court of Appeal held that the instruction given to the jury was proper. Part of the charge to the jury was reproduced in the Court of Appeal decision and is as follows;

> An alleged rape usually occurs without there being anyone present other than the man and woman who are involved ... and where consent is the serious issue, it is often easy for the woman to say that she did not consent, that is that she was raped in circumstances in which it would be very difficult for the man to defend himself. In such a case, and you have one before you here, you may convict upon the evidence of the complainant alone if you are satisfied beyond a reasonable doubt on all the evidence that her evidence is true; but you may consider it dangerous to do so unless there is some evidence, independent of the oral evidence of the complainant which shows or tends to show firstly, that the offence charged was committed; and secondly, that the accused committed it. Such evidence may remove the danger which is inherent in convicting on the evidence of the complainant alone; and that will be the case if the evidence is believed; if it is independent of the complainant's testimony; and if it is more consistent with

> the truth than the falsity of her story on the issue in dispute. That is, if that evidence is more consistent in this case with consent than with lack of consent.[319]

The trial judge went on to identify several pieces of evidence which he said would support the evidence of the complainant. The Court of Appeal found that the judge's instruction was proper and appropriate in the circumstances.

In the case of R. v. Firkins,[320] the British Columbia Court of Appeal held that in repealing former Section 142 of the Criminal Code, the Parliament had clearly stated its intention to remove any such requirement for corroboration with respect to the enumerated offences therein, and that the requirement which existed as a matter of practice at common law prior to the enactment of Section 142 in 1955 should not be revived by the judiciary.

Hoskins stated that the position taken in the Camp and Firkins cases was not uniformly accepted among the provinces, but that in most of Canada the repeal of Section 142 had its intended effect of repealing the warning rule.[321]

## (8) JUDICIAL REFORM OF THE CORROBORATION RULE

Following the statutory reform in 1975, the Courts began to follow the trend, moving away from the strict requirement of the corroboration rule where by law corroboration was still required.

Over the years, the Courts in England had become critical of the rule of corroboration, and had stated that the term "corroboration" was not a term of art but held an ordinary meaning like "confirmation" or "support". It was suggested that most charges to the jury regarding corroboration were unnecessarily confusing, and that a more easily understood and commonsense approach should be adopted.[322] The technical trappings of the corroboration rule and the strict requirements for corroboration which had been established through the years began to fall into disfavour with the Courts. One case decided by the House of Lords went so far as to say that corroboration was any evidence which made other evidence more probable.[323]

The Supreme Court of Canada in the 1976 case of Warkentin, Hanson and Brown v. The Queen[324] followed the reasoning of the British Law Lords. Corroboration, the Court said, was not a word of art but was a matter of common sense which should not be given a narrow legalistic meaning. The Court held that where the evidence was circumstantial, it was to be looked upon as a whole to determine whether it constituted corroboration in the sense that it was evidence which might help the jury to determine the truth of the matter. Prior cases had held that where more than one accused was involved, there had to be corroborative evidence linking each accused with the crime. In this case, involving a gang rape, the Court held that the common purpose that joined the perpetrators rendered every one of them a party to the act and that therefore there was no need to have corroborative evidence relating to each accused individually. Further, the corroborative evidence need not be fragmented and then related separately to the issues of consent, identity and intercourse, but was to be examined as a whole to establish the elements of the offence.

In the case Murphy and Butt v. The Queen,[325] the Supreme Court of Canada stated that, pursuant to Section 142 of the Criminal Code, what was required to be corroborated was a "material particular" of the evidence of the complainant and not her whole evidence.

In this case, one accused had admitted that intercourse had taken place, but relied upon the defence of consent. The other accused denied any involvement with the complainant. The Court held that it was proper for the trial judge to charge the jury that evidence capable of corroborating the complainant's testimony, with respect to the issue of non-consent was her observed emotional condition, and that this evidence constituted corroboration with regard to both accused, although the issue of consent was only relevant to one of the accused. That is, evidence confirming some material particular of the complainant's story, implicating one of the co-accused, served to confirm the whole of the complainant's testimony, including that implicating the other co-accused.[326]

The Courts began to shift away from the strict and complex rules of corroboration.

The Supreme Court of Canada finally and dramatically altered the law of corroboration in 1982 in the case of Vetrovec v. The Queen.[327] This case dealt with a number of accused who were convicted of conspiracy to traffic in heroin. The issue centred on the corroboration of the testimony of an accomplice. Mr. Justice Dickson, as he then was, stated that the law of corroboration was in need of reform, and that the area was one of the "most complicated and technical areas" of law.[328] He stated that the application of the warning rule was often detrimental to the accused, was confusing to juries, and placed an onerous burden on judges. He spoke of the increasing length and complexity of criminal trials due to the technical rule, and the resulting quashing of verdicts and ordering of new trials based upon faulty warnings given by trial judges. The trial in issue had run for more than 100 days. The Court cited with approval the apparent trend in the English Courts to cast aside the technical "impedimenta" with which the idea of corroboration has been loaded.[329]

In a bold move, the Supreme Court of Canada departed from its own precedent and chose not to follow the Baskerville case which had dominated the law of corroboration for sixty-five years. Mr. Justice Dickson criticized the Baskerville case on three grounds.

(i) The credibility of the witness and the weight of the evidence was said to be the crucial matter. The technical approach to corroboration deflected attention from this issue;

(ii) The complex and confusing rules had developed from too technical an approach to corroboration; and

(iii) The definition of "corroboration" was unsound in principle; to accredit the witness one need not implicate the accused.

The Court stated that corroboration should not be a "fixed and invariable rule", that there was nothing inherent in the evidence of an accomplice which automatically rendered him untrustworthy.[330]

Hoskins sums up the effect of the Vetrovec decision;

> Baskerville is dead. Disapproved and the very principle of its definition found unsound. No longer can it be the key to new trials or acquittals for convicted sex offenders. All the case law based on Baskerville stands discredited. It cannot rise again to impose unwanted rules as happened with sloppy legislation and bad case law ...[331]

## (9) CONCLUSION

Historically, many types of witnesses had been excluded from giving evidence at trial out of a fear that the testimony might be fabricated, and due to a lack of faith in the jury. Over the years, the law evolved to permit all relevant evidence to be admitted; only a small number of classes of witnesses remained suspect, including female victims of sexual offences. Thus, the corroboration rule developed requiring that before an accused could be convicted, corroborative evidence must exist to substantiate the victim's testimony.

Two variations of the corroboration rule had unfolded - the mandatory rule and the warning rule. The mandatory rule provided that an accused could not be convicted unless evidence capable of corroborating the relevant facts was believed and corroborated the victim's testimony. This rule, enacted in the 1890's, applied to the statutory sexual offences enacted to appease Parliamentarians who objected to the creation of a new series of sexual offences intended to protect the vulnerable new women workers of the industrial revolution. The warning rule - a derivative of the mandatory rule - applied to the common law sexual offences, such as rape, and was made a statutory requirement in 1955. The classic definition of corroboration was enunicated in the Baskerville case and formed the foundation for the development of the rule in both Britain and Canada.

The thinking behind the rule lay in a deep mistrust of women, a reoccurring theme in the history of the rape laws. The law makers and proponents of the criminal justice system upheld the requirement for corroboration in rape cases out of a fear of false charges of rape by women and a lack of faith in the ability of a jury, who, feeling "outraged" by the nature of the offence would be unable to properly evaluate the testimony of a rape victim. A severe penalty awaited the hapless accused who found himself trying to defend a charge which was easily made and difficult to defend.

The rule was technical and complex and was unevenly applied from jurisdiction to jurisdiction. The onus on the trial judge to make a determination as to whether or not corroborative evidence existed, to draw the attention of the jury to the evidence, and to properly define the intricacies of the corroboration rule, led to many appeals and acquittals. Even a judge sitting alone faced a delicate task of properly addressing him or herself on the technical requirements of the rule.

Was there any necessity to treat a victim of rape any differently than any other witness? The statistics showed that rape was and continues to be one of the most underreported crimes with one of the lowest conviction rates of all violent crime. Empirical studies demonstrated that rather than exhibiting a bias towards the rape victim, the average juror was more inclined to feel sympathy for the accused. Further, studies indicated that jurors were generally as sophisticated as judges in their analysis of evidence. Moreover, a judge's instruction to a jury about the corroboration rule often confused the jurors.

Traditionally, in any case, a judge has the right and, in some cases, the duty, to comment on the evidence and to assist the jury as to the weight that should be given to the evidence. As the Law Reform Commission of Canada commented, an enormous superstructure had been erected on the original basic assumption that the evidence of some witnesses should be approached with caution. The rule attracted a number of critics who declaimed the discriminatory nature of the rule as well as its complex legal trappings.

The discretionary warning rule found in Section 142 of the Criminal Code was repealed in 1975. The Courts followed the trend in easing the requirements of the rule in situations where corroboration was still required. In a dramatic move, the Supreme Court of Canada broke with tradition over-ruling the Baskerville case. The Court said that each witness should stand on his or her own testimony, for there was nothing inherent in the evidence of a person who fell into a particular class of witness which made that person any less trustworthy.

## C. REPUTATION EVIDENCE - THE COMPLAINANT ON TRIAL

> Most judges, lawyers and those experienced in the trial of rape cases would tell a female member of their household if she were raped that it would be much better not to complain about it because to the victim the trauma of a rape trial can be often more serious than the original assault.[332]

In an article entitled "Cross-Examination of the Complainant in a Trial for Rape", Philip McNamara[333] commented upon the common law rules of evidence relating to the cross-examination of complainants in rape trials;

> ... the earlier law had permitted and indeed encouraged such extensive cross-examination of rape victims that it was widely claimed that, not only did rape trials degenerate into a trial of the complainant rather than of the accused but that, by reason of the notorious humiliation and embarrassment suffered by the prosecutrix in consequence of the exposure during the trial of her private life and sexual past, rape victims were in fact deterred from reporting crimes against them ... An accused who was able to tender evidence of reputed unchastity and sexual promiscuity on the part of his accuser was thereby able to bolster his chances of acquittal; in cross-examining the complainant ... an accused was often able to intrude into the private life of the complainant far beyond the bounds of substantial relevance.[334]

As stated, the rape trial was often a harrowing experience for the rape victim, particularly where the accused's counsel sought to explore the victim's prior sexual history.

Traditionally, at common law, evidence of the complainant's prior sexual history was considered admissible in connection with two issues:

(i) the issue of consent; and

(ii) for the purpose of impeaching the complainant's credibility.

Based upon the decision of the Supreme Court of Canada in Laliberte v. The Queen,[335] heard in 1876, a rule developed which permitted defence counsel to question the complainant about her prior sexual history in the following circumstances;

(i) Where consent was in issue, the defence could question the complainant about all aspects of her sexual relationship with the accused. She could also be asked general questions, without mentioning specific details or names of partners, relating to her common reputation for chastity. In both instances, the complainant was bound to answer, and evidence could be tendered by the defence to disprove her testimony.

(ii) Where the credibility of the complainant was in issue, questions as to the witness' prior sexual activities with named persons, other than the accused, could be posed, but the complainant was not bound to answer for the issue of credibility was seen by the Courts as a collateral issue. In this situation, the witness could refuse to answer, or the judge could tell the witness that she was not obliged to answer, although he was not bound to do. If the complainant answered in the negative, she could not be contradicted, for no further evidence could be led by the defence with regard to this matter.

These two areas will now be examined in more detail.

## (1) PRIOR SEXUAL HISTORY OF COMPLAINANT AND THE ISSUE OF CONSENT

Questions relating to the complainant's prior sexual history with the accused were held to be relevant as to the issue of consent. As stated in the case of The King v. Finnessey,[336] the complainant could be asked as to her previous sexual history with the accused, because it was said to bear directly on whether or not the alleged act of intercourse complained of took place without the consent of the victim. Having consented to sexual intercourse with the accused in the past created a presumption in the eyes of the law that the complainant had consented to the act complained of.

With respect to the issue of consent, the accused was also entitled to tender evidence to prove that the victim was or had been a common prostitute or had been indiscriminately promiscuous. Where such evidence was led but denied by the witness, the accused was entitled to adduce evidence of specific acts of intercourse between her and unnamed men to prove the allegations of prostitution or promiscuity. Such evidence was accepted by the Court in support of the accused's defence of consent.[337] The rationale was that an unchaste woman was more likely to consent to intercourse in a given situation than a chaste or virtuous woman.[338]

Where the accused relied upon consent as a defence, he was entitled to prove his entire relationship with the victim, including consensual sexual acts indulged in before or after the act, which was the issue of the charge. Further, the defence was within its rights to adduce evidence and to cross-examine in anticipation thereof to prove that the complainant had a bad reputation or bad character in relation to sexual matters. In particular, the defence was entitled to attempt to prove that the complainant was or had been a common prostitute or was indiscriminately promiscuous.[339]

Questions concerning the complainant's sexual history with the accused or which showed her general reputation for chastity were said to be relevant to the issue of consent. The Courts held that with respect to the issue of consent, the complainant could not be compelled to answer questions about specific sexual acts with persons other than the accused for such evidence went to credibility rather than the issue of consent. It was stated that sexual activities of the victim with other men did not provide a defence to a charge of rape.

## (2) PRIOR SEXUAL HISTORY OF COMPLAINANT AND THE ISSUE OF CREDIBILITY

Mr. Justice Haines stated in an article entitled "The Character of the Rape Victim", "Our law does not permit character assassination of victims of rape".[340] Many would disagree with this assessment. For instance, Stephen Leggett in an article entitled "The Character of Complainants in Sexual Charges"[341] stated;

> In almost every charge of a sexual nature and involving a female complainant, counsel for the accused will attempt to explore the moral background of the female complainant.
>
> One often feels after a particularly strong cross-examination that it is the prosecutrix and not the accused who is on trial. On many occasions, the witness is reduced to tears and all counsel are familiar with the unscheduled recesses that are necessary in some circumstances to allow the witness to recover her composure.[342]

How did the law come to link chastity with credibility?

Generally, the purpose of cross-examination on credibility is to elicit material which will support an inference that the witness is not to be believed on his or her oath. At common law, it is proper to cross-examine to disparage the conduct and credibility of the witness if there are reasonable grounds for such an attack. Where bad character or previous misconduct is relied upon to cast doubt on the witness' reliability and veracity, the character or conduct must be such as to involve a moral failure on the part of the witness which makes it probable that he or she is not telling the truth. The evidence must show recent dishonesty, betrayal of trust or confidence, unscrupulous behaviour, unreliability, or dereliction of duty. It is not relevant to attempt to show bad character which does not relate to untruthfulness.[343]

It came to be accepted at common law that in rape cases the sexual history of the complainant was relevant to her credibility. The causal relationship between chastity and credibility and the belief that promiscuity denoted dishonesty was a theory espoused by many legal scholars, including Dean John Henry Wigmore. Dean Wigmore advocated that evidence of bad general character or specific general qualities other than of veracity should not be admitted to test the credibility of a witness, but made a crucial distinction when it came to a woman who accused a man of a sexual offence. This great legal scholar contended that the credibility of a complainant in a sex offence could only be determined if evidence of her chastity was admissible and assessable by a psychiatrist.[344]

The logic of relating the prior sexual history with credibility is discussed by Neil Brooks as follows;

> Why do judges permit such questioning? Many judges permit it on the ground that the questions are relevant as tending to show the veracity of the victim as a witness. These judges reason that if the victim admits some form of previous sexual conduct it can be inferred that she is a woman of bad moral character. If she is an immoral person then it can be inferred further that she is a person who would not have conscientious scruples about lying in the witness box. That is to say, some judges appear to reason that if a woman consents to sexual intercourse outside of marriage then she is a person who would also lie. This reasoning, based as it is on a causal relationship between sexual conduct and veracity, reflects a rather primitive notion of human behaviour.[345]

Indeed, it would appear that in a rape case, the complainant was in a much worse position than the accused, for if the accused chose to take the stand to testify, he could be cross-examined on his criminal record. His answers, however, related only to credibility; he could not be cross-examined to show that he was a bad person and because he was a bad person that he would be more inclined to commit the offence with which he was charged.[346] In contrast, the complainant, who did not have a choice about testifying, as a compellable witness for the Crown, could be subjected to questions about her previous sexual history with other named individuals, with the accused, and indeed, her entire moral background.

It was said that such questions were proper to protect the innocent against the spiteful complainant, and to allow the accused an opportunity to defend himself against a charge which was viewed as difficult to defend.

As stated by Mr. Justice Haines, the final protector of justice for the complainant was the trial judge. While the defence counsel had a right to put such questions to the witness, it was the ultimate discretion of the trial judge to compel an answer. Generally, the judge has an overriding discretion to control the proceedings, and as such can overrule any questions which are vexatious, irrelevant, indecent, offensive or intended to insult or annoy a witness.

Few judges exercised their discretion to prevent the abuse of rape victims, but granted considerable license to defence counsel to cross-examine complainants without censure.[347]

It was also open to the victim to refuse to answer such questions in the event that the learned judge did not exercise his discretion. In fact, Mr. Justice Haines proposed that local Crown counsel advise victims of their rights and vigorously assert these rights. In the event that the judge found a witness in contempt of court for failing to answer a question, he suggested that Crown counsel be prepared to prosecute an appeal on behalf of the victim at Crown expense. He also advocated the right of victims to retain counsel during the trial.[348]

Many critics believed that questions relating to the complainant's sexual history were asked not to test the credibility of the witness but to destroy the character of the complainant before the jury. The very fact that a question was posed often led the jury to believe that the defense counsel had some strong basis for asking the question, that there was some truth behind the allegation.[349]

A few of the standard questions asked of a rape complainant were set out in Mr. Justice Haine's article, as follows:

1. Were you on the pill?
2. Have you ever had an illegitimate child?
3. Have you ever had an abortion?
4. Have you ever been treated for venereal disease?
5. How old were you when you first had sexual intercourse?
6. With how many men have you had sexual intercourse?
7. Have you had sexual intercourse with "X", with "Y", and so on?
8. Do you have sexual problems?
9. Do you smoke marijuana? Do you take drugs?
10. Are you married to the man with whom you are living?[350]

It has been stated, in rape cases, that the Courts turned their attention to the reputation and character of the complainant, not to promote justice by ensuring a fair trial to the accused, but because they were unwilling to extend the protection of the rape laws to women of doubtful reputation.[351] Evidence of past sexual history was adduced not to determine the credibility of the witness, but to assess the witness' character, to determine whether she was the type of person who should benefit from the protection of the rape laws. The fact that questions relating to the complainant's past were asked, whether the victim answered in the affirmative or refused to answer, would impugn the character of the witness, convincing the jury that the victim was less deserving of the protection of the rape laws, and leading to the exoneration of the accused even where the jury believed that the accused committed the crime.[352]

To test this theory, Katherine Catton designed an experiment to determine whether evidence concerning the victim's prior sexual relations was used by the jury to assess the credibility of the victim (as the proponents of the rule of evidence claimed), or whether it was used directly to determine issues about her character. A jury simulation method was employed where subjects were asked to imagine that they were jurors. They were presented with a hypothetical case in which a man was accused of rape. As part of the case, some "jurors" received information about the alleged rape victim's prior sexual history, while others received no evidence about the victim's background. The group was asked to assess the guilt of the accused, to determine the sentence, and to express feelings on the "justness" of the accused being found guilty and being sentenced to prison for the given average term.[353]

The results of the test revealed that;

> When jurors heard information regarding an alleged rape victim's prior sexual history with named persons, whether this information was confirmed or denied, this information decreased their perceived guilt of the accused in comparison with a situation where no information relating to the victim's supposed past sex life was heard. This decrease in the perceived guilt of the accused varied directly with the "amount" of negative information presented about the victim.[354]

The researcher concluded that the danger inherent in the rule of evidence was obvious, for it was possible for the defence to make allegations about the victim's prior sexual history, thereby impugning her character, even though such allegations were without foundation in fact. No evidence could be led by the complainant to refute the innuendo created by this line of questioning. In fact, the study concluded that even where the victim denied the allegations or did not answer, the jurors tended to disbelieve her. The report concluded;

> In conclusion, no support was found for the espoused rationale behind this rule of evidence which allows the jury to hear questioning on the prior sexual relations of a rape victim with other named persons. The rationale is that evidence on prior sexual history is allowed in because it goes to her credibility as a witness. The data, if anything, tend to show that the evidence allowed in under this rule does not relate to the victim's credibility. That such evidence negatively influences how the juror assesses the guilt of the accused is clear. A negative halo effect seems the most likely mechanism underlying this phenomenon. The fact that merely questioning a victim about such matters, even when the imputations are denied or the questions disallowed, results in a juror perceiving the accused as less guilty indicates that this sort of questioning influences a juror's decision when it is not supposed to do so.[355]

American studies reached similar conclusions. Negative information about a rape victim resulted in jurors viewing the victim as a person less deserving of the rape laws, even when the jurors believed that the accused was guilty of the crime.[356]

Another Canadian study commissioned by the Law Reform Commission of Canada and conducted by Doob, Kirshenbaum and Brooks entitled "Evidence of the Character of a Victim in a Rape Case" (1973) and referred to in the Brooks' article, came to the same conclusion as the Catton study, that the Crown's case was prejudiced by the introduction of evidence of the rape victim's past sexual conduct. The report concluded that a juror did not appear to use the evidence to decide whether the victim consented or whether she was a trustworthy witness, but to decide whether or not she should be protected by the rape laws. Brooks speculated as to reasoning behind this finding;

> The jury perhaps reasons that if the woman is of bad character, the harm the accused causes by raping her does not justify convicting him of the serious offence of rape.[357]

## (3) CRITICISM OF THE LAWS OF EVIDENCE IN RAPE CASES

During the 1970s, critics became more vocal in their condemnation of evidence laws which permitted defence counsel to explore all matters relating to the complainant's prior sexual life, either real or imagined. The move to reform the evidence laws gathered momentum throughout the common law jurisdictions, including Britain, Australia, New Zealand, the United States and Canada.[358]

On April 26th, 1976, the former Section 142 of the Criminal Code relating to corroboration as previously discussed, was repealed, and a new section was substituted.

Before reviewing the amendments to the Code, it is interesting to examine some comments received from the public by the Law Reform Commission on this matter in response to its Study Papers on Evidence.[359]

The Law Reform Commission had recommended that all evidence with respect to the prior sexual history of the victim be inadmissible, and in doing so, proposed;

> By the present law the character of the victim, good or bad, is generally not receivable as circumstantial evidence of the victim's conduct on the occasion in question. The only exception

> exists in cases involving sex offences. For example, in a rape case the victim's reputation as a prostitute may be received as evidence tending to establish that she had consented to the intercourse complained of and character evidence in rebuttal is similarly admissible. Indeed, in some cases the woman's reputation, not her consent, becomes the central issue. Besides questioning the probative worth of such evidence, the Project was deeply concerned with the effects of existing abuses of this type of evidence. Since the complainant may suffer unfair embarrassment and great harm, rape victims are often reluctant to press charges, and also women of bad character are provided with little protection against rape. The Project therefore is now recommending that in cases involving sex offences, the defence not be permitted to adduce evidence of the bad character of the victim either on cross-examination or in its case in chief.[360]

In response to the recommendations of the Law Reform Commission, many members of the public wrote to the Commission expressing their views on the subject.

D.E. Bowman, a lawyer from Winnipeg, made reference to the fact that the Law Reform Commission paper had observed that the complainant may suffer "unfair embarrassment and great harm". His response was;

> I find it difficult to equate such embarrassment and harm with that occasioned to an accused person convicted of rape on the unsupported evidence of a woman whose background he has not been able to bring out. The law has recognized what the project authors do not; that this kind of charge is easily made, difficult to refute and emotive in character, insofar as a jury is concerned. The law has created safeguards without which even greater numbers of unfounded charges would be prosecuted to conviction. In my experience over perhaps thirty or more rape defences, I doubt that I was satisfied that more than four or five, and those almost all involving several men and one woman, were actually rape.[361]

An unidentified Justice of the Supreme Court of British Columbia reinforced the views of Mr. Bowman and stated;

> I do not agree with the proposal to prevent the accused in a sexual case from cross-examining the complainant as to previous acts of immorality with the accused or other persons. This may be embarrassing to the complainant but the whole affair is no doubt quite uncomfortable for the accused. These matters do go to credibility on the issue of consent.[362]

Mr. S. Schiff, a professor of law at the University of Toronto, had these comments to express, which are repeated verbatim;

> I do not agree that relevant and important evidence re; the complainant's character in a sex assault case should be excluded as you argue ...; the risk of trumped-up sex charges is too great - where the alleged victim had previously screwed with the accused, your provision prevents evidence of those past events, which are surely of great probative value, even on cross-x.
>
> - and where the alleged victim was notoriously a loose woman, you even more emphatically reject the evidence.
>
> - and you do all of this to protect the complainant, but ignore the dangers to the accused.[363]

## (4) LEGISLATIVE CHANGES TO THE LAWS OF EVIDENCE IN RAPE CASES: SECTION 142 OF THE CRIMINAL CODE

Despite the fact that many in the legal profession supported the retention of the archaic rules of evidence as they related to trials of rape, Parliament introduced an amendment to the Criminal Code which attempted to address the inequities faced by complainants at trial.

Section 142(1) of the Criminal Code enacted on April 26th, 1976, read as follows:

> Where an accused is charged with an offence under Section 144 (rape) or 145 (attempt rape) or subsection 146(1) (statutory rape) or 149(1) (indecent assault), no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless;

(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the Court; and

(b) the judge, magistrate or justice, after holding a hearing in camara in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.[364]

It was said by the Honourable Ron Basford, then Minister of Justice, that Parliament was reacting to the criticism of those who had objected to the manner in which rape trials had been conducted, and that the purpose of the proposed amendments was to reduce the embarrassment endured by victims during rape trials, thereby encouraging more victims to report rapes.[365]

It is ironic that the enactment of the new section, at first heralded by the proponents of reform, came to be interpreted by the Courts as granting the accused even broader powers to cross-examine the complainant about her prior sexual conduct. Thus, the very piece of legislation supposedly enacted to encourage more victims of rape to report rapes came to work against them.

In essence, Section 142 stated that no question could be asked as to the prior sexual conduct of the witness unless:

(i) Reasonable notice was given;

(ii) Sufficient particulars of the evidence to be adduced was provided; and

(iii) The judge decided, after an in camera hearing, that exclusion of the evidence would prevent the just determination of an issue of fact in the proceedings, including credibility of the witness.

A review of the cases in this area illustrates how the section was interpreted in a manner which thwarted the intentions of the law makers.

In the case of R. v. McKenna, McKinnon and Nolan,[366] the Court held that the reasonableness of the notice as prescribed by Section 142 was a question of fact to be determined by the trial judge. In this particular case, three men were accused of raping a woman. The preliminary inquiry was set for November 3rd, 1976, at 10:00 a.m. The notice under Section 142 was received by the Crown on the afternoon of November 2nd, 1976. In this situation, the Court held that reasonable notice had been received for the Crown had ample time to conduct an interview of the witness to review the facts set forth in the notice.

The observations of the judge are interesting. He stated that prior to the enactment of Section 142 it was not uncommon for counsel for an accused person to question the complainant with respect to her character or with respect to previous acts of sexual intercourse with the accused or other persons. In his opinion, this line of questioning was more the rule than the exception. He went on to say that the enactment of Section 142 did not mean that what was once common would now become the exception, for the basic right of the accused to cross-examine the complainant was not interfered with by the enactment of Section 142. He commented on the particulars to be provided by the section, stating that they need not be minute in detail but must be specific and should relate to specific conduct of the complainant so as to enable the Court to isolate and identify the conduct of the complainant. In this case, the evidence provided in the notice referred to the complainant's habit of picking up men in bars for sexual gratification. The judge stated that such evidence was relevant, for the complainant had allowed herself to be picked up in a bar by the three accused and then alleged that she had been raped by them. The judge stated;

> Since the enactment of Section 142, of course, the Judge, in considering whether to exercise his discretion in favour of or against the allowing of questions, is entitled to take into account the credibility of the complainant, if credibility is an issue and as that credibility might be affected by any prior acts of sexual conduct engaged in by her.[367]

Prior to the enactment of Section 142, the credibility of the complainant was a collateral issue, and as such, the complainant could refuse to answer the questions, deny or confirm the allegation, but her answer could not be contradicted. The matter ended there. Following the enactment of Section 142, the cases interpreted the section to expand the rights of the accused.

In the case of R. v. Morris,[368] the Court held that Section 142 contemplated that the credibility of the complainant was an issue of fact in the proceedings, and that this Section was designed to permit the defence to call evidence to rebut the complainant's denial of sexual intercourse with other men. As stated by the Court;

> The section removes surprise or lack of opportunity for preparation as a reason to exclude such evidence. It protects the complainant against false accusation, and, as more important, protects the accused against the false answer by the complainant.[369]

The judge stated that prior to the enactment of Section 142, the accused's only remedy was a perjury indictment against the victim if she denied allegations relating to her past sexual history, and that it was the intention of the amendment to the Criminal Code to remedy this problem.

The trend of interpreting Section 142 to broaden the accused's legal rights was followed by the case of R. v. Moulton.[370] In this case, the particulars provided under Section 142 by the defence counsel were that the complainant was a prostitute prior to the alleged offences. The judge in the case held that the notice was sufficient for the particulars as to the evidence related to the general character of the complainant. The judge stated that Section 142 had enlarged the rights of the defence to call evidence to contradict the complainant, and that by its plain words, applied to all cases in which it was proposed to ask questions of the complainant as to her sexual conduct with men other than the accused. Questions as to the complainant's general reputation for chastity, including whether she was a prostitute, also invoked the section, since of necessity such questions dealt with the sexual conduct of the complainant with persons other than the accused.[371]

The facts surrounding the rape in this case were particularly brutal. The complainant had accompanied the accused and another man to an apartment, had been burned with a spoon, punched, bitten on the face and stomach, threatened with a knife, and almost drowned in a bathtub. The defence of the accused was consent; the injuries were explained by the accused's allegation that the complainant had fallen down the stairs.

At the in camera hearing, the trial judge held that the complainant was a compellable witness. She was asked by defence counsel whether she was a prostitute. She admitted that she had been in the past, but testified that she had ceased to be a prostitute months prior to the time of the offence. The judge allowed the defence to call witnesses to refute the complainant's testimony. The accused was acquitted of rape at trial and the decision of the Court was appealed by the Crown.

The Court of Appeal of Alberta upheld the acquittal of the accused and reaffirmed the trial judge's decision that the complainant was a compellable witness at the in camera hearing. The Court said that evidence that the complainant was a prostitute went to her credibility and was therefore admissible. Since the enactment of Section 142, the credibility of a complainant was an issue in fact, and therefore the complainant could be cross-examined and contradicted with respect to answers to questions concerning previous sexual conduct with other persons.[372]

The Supreme Court of Canada had its first opportunity to examine Section 142 in Forsythe v. The Queen.[373]

The case involved the application of Section 142 at the preliminary hearing, where the presiding judge had decided that the requirements of reasonable notice and sufficient particulars had been satisfied, but declined to compel the complainant to give evidence, requesting that the person named in the particulars first testify so that he could determine whether or not to call the complainant. The defence would not agree to call the other witness named in the notice. The trial judge then declined to compel the complainant to testify and held that although the complainant was a compellable witness, a proper basis first had to be laid for calling her. The accused brought an application for a Writ of Certiorari to quash his committal.

The Supreme Court of Canada held that in this instance the remedy of certiorari was not available to the accused. The Court went on to say that the complainant, whose credibility was an issue of fact specified in Section 142, must be compellable and became the accused's witness if called by him at the hearing. The purpose of Section 142 was two-fold; one, to alleviate the trauma, humiliation and embarrassment of the complainant by inquiring into her past sexual conduct with others, and two, to balance the rights of the accused. Under the prior law the accused was precluded from making further inquiry if the complainant denied allegations of past sexual misconduct. While at common law the complainant's denial of sexual misconduct with persons other than the accused was final, it was now open to the accused to pursue and seek to contradict by other evidence a denial by the complainant. Other witnesses could be called to impugn the credibility of the complainant.

With respect to the procedure under Section 142, the Court reaffirmed that the question of what was reasonable notice was one of fact. The requirement of "the particulars of the evidence" was said to encompass the time and place and the names of other persons allegedly involved with the complainant. It was stated that the accused need not set out the very questions which were intended to be asked. With respect to the compellability of the complainant at the in camera hearing, the Court held that since the credibility of the complainant was now an issue in fact, as specifically set forth in the section, the complainant must be compellable in order for the judge to make an assessment of the witness, including her demeanour, knowledge of events and the consistency of her testimony.

In an article entitled "Section 142 of the Criminal Code; a Trojan Horse", Christine Boyle[374] analysed the effects of the Forsythe decision. In her view, the Supreme Court of Canada concluded that there was a "trade-off" in the enactment of Section 142. If the judge so decided, the witness could be protected from answering questions about her previous sexual conduct with persons other than the accused, and in return, the accused could insist on answers and lead evidence to contradict the complainant's testimony. In Boyle's view, the finding of the Court was based on a perceived need to balance the protection of the witness with the new rights of the accused. She criticised the decision as a "regrettable and unnecessary 'tit-for-tat' approach" to judicial lawmaking, in light of the fact that the section had been introduced not to remedy a problem of the over-conviction of alleged rapists but out of concern about the under-reporting of rape and the poor conviction rate of rapists.[375] As she stated, prior to 1975, one did not perceive that there was public concern about the accused in rape trials receiving a fair trial.

Prior to 1975, evidence of the complainant's prior sexual history, which was said to go to her credibility, was deemed to be a collateral issue and contradictory evidence could not be led as it did not justify the expenditure of judicial time and public money. Boyle queried;

> The basic issue therefore is - is evidence of sexual experience with persons other than the accused ever relevant? If it is not, then Section 142 is deceptive since it seems based on the assumption that it is sometimes relevant to a fact in issue. If it is per se, then Section 142 is likewise meaningless in its apparent offer of protection since the judge will always permit the questioning and the witness is in a worse position than ever in view of her new obligation to answer and her liability to challenge.[376]

The problem forseen by Boyle was that Section 142 offered very little legal protection for the rape victim, for she still had to rely upon the discretion of the judge to be guarded from the humiliating and demeaning questions relating to her prior sexual history. Moreover, the Supreme Court of

Canada held that the rights of the accused were expanded by the amendment to the Code.

In 1983, the Supreme Court of Canada again had occasion to rule on Section 142 of the Criminal Code. In the case of R. v. Konkin[377] an accused was convicted of attempted rape. At the time, notice had been served under Section 142 and an *in camera* hearing had been held wherein the complainant had testified that she had had sexual intercourse with men prior to the incident of rape, and also admitted that approximately three months after the offence she engaged in sexual intercourse with five men in one evening and on other occasions with more than one man in the same evening. She stated that the trauma of the assault by the accused had caused her to act in this way. The trial judge permitted cross-examination with respect to the incidents prior to the offence, but held that there could be no cross-examination with respect to the sexual incidents which took place after the alleged offence.

The Supreme of Canada held that it was an error on the part of the trial judge to conclude that the post-offence "misconduct" of the complainant was irrelevant to the charge at hand. The trial judge had stated in his decision that the fact that the complainant had had sexual relations after the offence was "nobody's business", that her sexual conduct after the event was not relevant to the issue of her credibility.

The Supreme Court of Canada upheld the Court of Appeal's decision to allow the accused a new trial, overriding the trial judge's decision.

In January of 1978, the Evaluation and Statistics Unit of the Department of Justice of the Government of Canada published a brief assessment of the impact of Section 142 of the Criminal Code.[378] The study hoped to determine the following issues:

(i) The propensity of defence counsel to make applications under Section 142(1);

(ii) Whether defence counsel, if successful in bringing an application, cross-examined complainants on their prior sexual history;

(iii) Whether the existence of the subsection increased the rates of guilty pleas to rape charges;

(iv) The effect of the subsection on the propensity of women to report rape offences; and

(v) The relationship between whether a complainant was cross-examined as to her prior sexual history and the rate of guilty findings in rape trials.

Letters were sent from the Department of Justice through the Deputy Ministers of each of the provinces (except Quebec) to Crown counsel who were involved in rape trials from April 26th, 1976 to April 25th, 1978. The Crown counsel were asked to complete questionnaires. Answers were received from all provinces except Newfoundland and British Columbia. Due to time and resource limitations, the assessment was largely "impressionistic", the writers warning that the results of the study were to be interpreted with considerable discretion.[379] Generally, the study indicated that there were few successful applications made under Section 142(1) and that even where defence counsel were successful in their applications, they cross-examined complainants on their prior sexual history in about only half of the cases. The Crown counsel who completed the questionnaires generally felt that the rate of guilty pleas had increased since the enactment of Section 142 but that the section had no affect on the tendency of women to report rape offences. This study also indicated that there did not appear to be a positive relationship between whether a complainant was cross-examined on her prior sexual history and the rate of conviction in rape cases.[380]

Overall, it appeared that the enactment of Section 142 did little to reduce the embarrassment endured by victims during rape trials, for the ability of the defence counsel to focus on the prior sexual conduct of the complainant was not fettered by the amendment. In fact, evidence which was once considered collateral (the complainant's credibility) had now become a fact in issue. The complainant was now a compellable witness who could be compelled to answer questions about her prior sexual activities and her answers could be contradicted by witnesses. It may have been that the legislators had indeed intended to protect the rape victim from the humilation of the trial, and had assumed that after the enactment of Section 142 the debasing suggestions and innuendo which had been commonplace at rape trials would cease. Unfortunately, the Courts interpreted the section to enlarge the rights of the accused, and consequently, the enactment of Section 142 had the effect of tipping the scale even further in favour of the accused.[381]

## (5) THE CROSS-EXAMINATION OF THE VICTIM - OTHER ISSUES

As stated, the prior sexual history of the rape complainant could be explored by defence counsel in relation to the issue of consent and for the purpose of impeaching the complainant's credibility. Aside from these matters, defence counsel traditionally were given great latitude in attempting to impeach the complainant's testimony dealing with the facts surrounding the alleged rape.

In any rape trial, it is for the Crown to establish the necessary elements of the crime:

(i) that the act of sexual intercourse took place;

(ii) that the accused was the perpetrator of the act; and

(iii) that the act took place without the consent of the complainant.

In order to establish his defence, defence counsel will generally explore "very carefully, in great detail, and in a manner fraught with innuendo, all of the circumstances leading up to the alleged rape".[382] The standard line of questioning by defence counsel was commented upon by Neil Brooks' as follows:

> For instance, if the victim met the accused in a bar or restaurant and accepted an offer to be driven home by him, defence counsel might ask: Why were you out alone, Miss Jones? Where was your boyfriend? Do you often drink with total strangers? Is it not a fact that you initiated the conversation with the accused? Are you in the habit of consenting to taking rides with strangers? Why didn't you take a cab? Isn't it true that you led the accused to believe that you wanted to leave and go to your apartment where you could be alone? Why were you wearing an open-necked blouse on the night in question? Why weren't you wearing a bra?[383]

Generally, defence counsel are permitted a wide latitude in cross-examining the complainant about collateral matters to discredit her by revealing the inconsistencies in her story. Brooks maintained that such questioning is embarked upon by defence counsel because it is believed that a jury would believe that a witness who assumes a risk of rape or voluntarily puts herself in a position where she might be raped is more likely to have consented to any resulting sexual intercourse than a person who does not assume such a risk. Unfortunately, whether one sees the merit in this rationale or not, one of the effects of this line of questioning had been to convince the jury that the victim was at least partially to blame for the sexual assault which occurred. As indicated, empirical studies have shown that juries were less likely to convict an accused, even where they found the facts showed that the accused committed the crime, where they felt that the victim assumed some risk and was therefore partially responsible for the offence being committed.[384]

In an article entitled "Proposed Amendments to the Criminal Code with Respect to Victims of Rape and Related Sexual Offences", G.R. Goodman[385] reviewed the incident of a sixteen year old Winnipeg girl who refused to testify in a rape trial because she feared the trauma of cross-examination. The incident occurred in 1974. After being subpoened, the girl attended at Court, but after only a few minutes of questioning by Crown counsel, left the stand without a word and walked out of the courtroom.

The sixteen year old claimed that the emotional shock created by the harrowing experience of the earlier preliminary hearing had caused her to be admitted to the hospital. Part of the transcript of the preliminary was reproduced in Goodman's article.

The complainant had testified at the preliminary inquiry that the accused had forced her to engage in oral sex and then had raped her. The pertinent questions of the defence counsel and answers of the complainant were as follows;

> Q. And I take it you couldn't see the person's face when he was supposedly licking you.
>
> A. No, I couldn't.
>
> Q. I see. How do you know he was licking you?
>
> A. I could feel that.
>
> Q. What could you feel?
>
> A. His tongue.
>
> Q. How do you know it wasn't his finger?
>
> A. I don't know. You can tell.
>
> Q. Oh, you can tell. I see. How you can tell? What's the difference in feeling between a tongue and a finger?
>
> A. I don't know. You can just tell.
>
> Q. Have you ever had someone lick you before?
>
> A. No.
>
> Q. No?
>
> A. (Shakes head).
>
> Q. Have you had someone ever put his finger in your vagina before?

> A. What has that got to do with it?
>
> Crown Attorney: That's quite true. I don't want to object to these questions, but they are not really questions I don't think that would be of any assistance to the accused and they are to a certain extent harrassing to the witness.
>
> The Court: It's a very pertinent substance on this charge, unless the lady has so alleged in her evidence in response to your question that this is what has happened."[386]

The Crown Attorney in this case objected to the questions on the basis that the questions concerned the victim's prior sexual history and were therefore related to the issue of the credibility of the complainant; as such, the witness was not compelled to answer. The judge held that it was the nature of cross-examination to cross-examine the witness on the evidence relating to the incidents leading up to intercourse, and as such allowed the defence to continue the line of questioning.

Mr. Goodman included four pages of the transcripts in his article. In reading the questions put to the witness, one wonders why it was necessary for the defence counsel to pose twenty-five questions relating to the difference between a tongue and a finger. The defence lawyer subsequently embarked upon a similar line of attack in a series of questions relating to the difference between a penis and a finger. Mr. Goodman comments;

> This is only a portion of a lengthy cross-examination of the complainant skilfully conducted by an experienced and very competent defence counsel. I have no complaint whatsoever about the conduct of counsel in the case; my complaint is that the law would permit this type of cross-examination.
>
> In analysing the cross-examination of the complainant, is it not cross-examination as to her character when defence counsel asks whether someone had licked her before or whether someone had put his finger in her vagina before? Or is her character impugned only when she is asked whether she had previous sexual intercourse; thereby distinguishing the tongue and finger from the penis?[387]

## (6) CONCLUSION

At common law, evidence relating to the complainant's prior sexual history was considered relevant in connection with the issue of consent and for the purpose of impeaching the credibility of the complainant.

Questions relating to consent were to be answered by the complainant, and if she denied the allegations put to her, evidence could be adduced by defense counsel to impeach her testimony. It was said that if a woman was promiscuous or was known to be a prostitute or indeed had sexual relations with the accused at some prior time, then she was more likely to have consented to the act of intercourse complained of.

Where the questions were related to the issue of credibility, the complainant was not bound to answer and whatever her response, no further evidence could be put forth by defence counsel to contradict her reply. The theory behind this rule stemmed from an anachronistic and biased view of women. It was said that promiscuity on behalf of a woman denoted dishonesty. Thus, a woman who would engage in sexual relations would be the type of person who would lie.

Many critics of the rape laws chastised defense counsel who, under guise of examining the complainant's credibility, sought to destroy her character before the jury. Others accused the Courts of being unwilling to extend the protection of the rape laws to women considered to be of poor character.

Tests proved that jurors who heard evidence relating to the victim's prior sexual history, whether that evidence was confirmed or denied, tended to disbelieve the complainant. The information decreased their perceived guilt of the accused. Further, studies showed that such evidence influenced jurors, causing them to view the victim as less deserving of protection of the rape laws. The inherent danger of this rule of evidence was the fact that the defence could make allegations about the victim's prior sexual history, although such allegations were untrue.

Parliament responded to the critics of this rule of evidence by enacting Section 142 of the Criminal Code in 1976. It was said that the amendment would reduce the embarrassment endured by rape victims during rape trials, thereby encouraging more victims to report the crime.

Section 142 stated in essence, that the complainant could not be questioned as to prior sexual conduct unless the following criterion were met:

(i) reasonable notice was given;

(ii) sufficient particulars of the evidence to be adduced was provided; and

(iii) the judge decided, after an in camera hearing, that exclusion of the evidence would prevent the just determination of an issue of fact, including the credibility of the witness.

Unfortunately, judicial interpretation of this new section extended defence counsel even wider powers to cross-examine the complainant about her prior sexual history.

In reviewing this new section, the Courts determined that the credibility of the complainant, formerly viewed as a collateral issue, was now an issue of fact in the proceedings. Consequently, the complainant, who was considered to be a compellable witness at the in camera hearing, was bound to answer any questions relating to the issue of her credibility. It appeared that the Courts interpreted the new enactment as balancing the rights of the rape victim with the rights of the accused, despite the fact that the law had been enacted to remedy the unfair treatment of rape victims at trial and to encourage rape victims to report the crime. What was heralded as a law to protect the victim of rape was interpreted by the Courts to give the accused even broader powers of cross-examination.

Another issue not addressed by the new legislation was the issue of conduct of defence counsel in attempting to impeach the complainant's testimony relating to the facts of the case. It has been said that counsel are generally permitted a wide licence to cross-examine the complainant while making veiled suggestions as to the witness' moral character. Indeed, the example cited of the ordeal endured by the sixteen year old Winnipeg girl speaks vividly for itself.

As noted, the trial judge is the final protector of the rights of the witness. Conduct calculated to embarrass and humiliate the complainant can only distort the issues at hand in the eyes of the jurors. Such conduct should not be tolerated by the Courts. If legislators and law reformers are intent in promoting the reporting of rape, reform must encompass all elements of the trial. The victim must not be afraid to complain for fear that the trauma of the rape trial will be more serious than the original assault itself.

## D. CONSENT

### (1) SUBJECTIVE AND OBJECTIVE TESTS FOR MENS REA

As noted, the offence of rape was not statutorily defined in Canada until 1892, although it had been considered a felony for more than fifty years prior to codification.[388] Previously, rape had been defined by legal writers as the unlawful and carnal knowledge of a woman by force and against her will. With the introduction of a statutory definition in 1892, the element of consent became the central issue, for rape was now defined as "the act of a man having carnal knowledge of a woman who is not his wife without her consent".[389] This definition remained largely unaltered until the Criminal Code was amended in January of 1983.[390]

The issue of consent in a rape trial was complicated by the evidentiary requirement of mens rea, or the guilty state of mind. As well as proving that the act of intercourse occurred - the actus reus of the crime - the Crown had to establish that the accused intended to have intercourse with the woman without her consent. Thus, in order to prove mens rea, the onus was on the Crown to prove that the accused had knowledge of the woman's lack of consent or, in the alternative, that the accused was reckless in ascertaining whether the woman was consenting. In other words, the actus reus of the crime was sexual intercourse with a woman who was not consenting, while the mens rea was knowledge that the woman was not consenting or recklessness as to whether she was consenting.[391]

Over the years, a debate arose on the availability of the defence of mistake with respect to the lack of consent. At common law, an honest belief by the accused in the existence of circumstances, which, if true, would make the act an innocent one, has always been an acceptable defence to a criminal charge.[392] The test was a subjective one, that is - did the accused have an honest belief in the existence of the circumstances? The belief had only to be honest; whether the belief was a reasonable one in the eyes of the trier of fact was not relevant. This standard of mens rea became acceptable in both Britain and Canada. In the United States, the standard of mens rea required was objective in nature; the mistaken belief of the accused had to be both honest and reasonable.[393]

The debate regarding the subjective and objective tests for mens rea came to the public fore with the controversial British case of D.P.P. v. Morgan[394] and the Canadian case of R. v. Pappajohn.[395]

In the Morgan[396] case, three men were invited home by the complainant's husband after a night of drinking together. The husband invited his companions to have sexual intercourse with his wife, the complainant. Apparently, the husband had told the men that his wife enjoyed group sex and that if she struggled and tried to resist, they were to ignore her, for this was the type of activity which she found sexually arousing. The men accompanied the husband home and, despite the cries and protests of the complainant, all four had forcible sexual intercourse with her.

The defence raised by the men to the charge of rape was, based upon the husband's representations, that of mistaken belief that the complainant was consenting. In any event, the defendants were convicted of rape. At trial, the jury had been instructed that an exculpatory mistake had to be reasonable. The Court of Appeal agreed, and the matter was referred to the House of Lords. The House of Lords held that if a genuine, albeit mistaken, belief on the part of the accused that the woman had consented could be demonstrated, the accused could not be found guilty of rape. It was held that the belief need not be reasonable but must be merely honest, and that the reasonableness of the belief served as objective evidence as to whether the belief was actually held by the accused. Thus, the reasonableness of the accused's belief that the complainant was consenting in the circumstances, became a yardstick for determining the honesty of the accused's belief.

In 1980, the Supreme Court of Canada had an opportunity to review the concept of mistake of fact as a defence to rape in Pappajohn.[397] In this case, the complainant, a real estate agent, and her client, the accused, Mr. Pappajohn, lunched together over a number of hours, consuming a great deal of liquor. They then retired to Pappajohn's house. Three hours later, the evidence showed that the complainant ran from the accused's home, hysterical, and naked except for a tie around her neck. Her hands were tied behind her with a cord. The complainant testified that five acts of forcible intercourse had occurred over the three hour period. The accused, on the other hand, spoke of a passionate encounter involving several acts of consensual intercourse.[398]

At trial, the judge did not instruct the jury as to the possible defence of mistake of fact, and the accused was convicted of rape. An appeal to the British Columbia Court of Appeal was based on the argument that the trial judge had erred in failing to instruct the jury on the defence of mistake of fact. The appeal was rejected and a further appeal was made to the Supreme Court of Canada on behalf of Pappajohn.

The decision for the majority in the Supreme Court of Canada was delivered by McIntyre, J. In his view, there were no facts in this case to support a defence of mistaken belief, and therefore it was unnecessary to put the defence to the jury.[399] McIntyre stated;

> There must be some evidence beyond the mere assertion by counsel for the accused of belief in consent. The evidence must appear from or be supported by sources other than the accused to give it 'any air of reality'.[400]

In distinguishing the facts of the Morgan case from the facts at hand, where the defence of mistake of fact had been put to the jury, the Court stated that in the Morgan case there was evidence explaining, however preposterous the explanation might be, a basis for mistaken belief.[401] In the view of the majority of the Supreme Court of Canada, the argument that the defence of mistake of fact ought to have been put to the jury was rejected, and it was held that there was nothing beyond mere assertion to support the accused's alledged belief in consent. The conviction of rape was upheld.

Dickson, J., as he then was, dissented on the main issue and found that the defendant's testimony provided sufficient evidence which, if believed by the jury, would have supported a defence of mistaken belief. Dickson, J. stated;

> I am not unaware of the policy considerations advanced in support of the view that if mistake is to afford a defence to a charge of rape it should, at the very least, be one a reasonable man might make in the circumstances ... [Fear] is expressed that subjective orthodoxy should not enable her alleged assailant to escape accountability by advancing some cock-and-bull story.[402]

Mr. Justice Dickson also explored in a general manner the nature of mistake of fact in relation to rape, and concluded that mistake of fact can be a defence to a charge of rape. In his view, the mistaken belief on the part of the accused did not have to be reasonable but it was sufficient if it was an honest mistake.

In essence, Dickson, J. felt that the law must balance all relevant considerations between the rights of the accused and the rights of the complainant. Four points were made:

(i) The cases in which mistake of fact can be adduced were said to be few in number, for an evidential case must exist to support the defence;

(ii) It was felt that it may be unjust to convict an accused if the witness withholds her consent, but by her conduct and other circumstances leads the accused to believe that she is in fact consenting;

(iii) It is unfair to the jury and inherently unfair to the accused to speak of two minds involved in the act, that is, what the accused thought at the time and what a reasonable man would have thought at the time. The essential element is the belief of the accused;

(iv) In any event, juries will consider the reasonableness of any grounds found or asserted in support of the defence of mistake of fact in determining whether or not the defence is available to the accused.[403]

Dickson, J. went on to state;

> Canadian juries, in my experience, display a high degree of common sense and an uncanny ability to distinguish between the genuine and the specious.[404]

Mr. Justice McIntyre in the majority judgment disagreed with Mr. Justice Dickson on the main issue, but was in agreement with Mr. Justice Dickson's analysis of the defence of mistake of fact in rape.

The issue of consent and mistake of fact raised in the two leading cases referred to above are discussed in four articles, one by Thomas J. Lewis entitled "Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change?"[405], the second and third by Toni Pickard entitled "Culpable Mistakes in Rape: Relating Mens Rea to the Crime"[406], and "Culpable Mistakes in Rape: Harsh Words on Pappajohn"[407], and the fourth by Don Stewart entitled "Pappajohn: Safeguarding Fundamental Principles".[408]

Thomas J. Lewis, in reviewing the issue of consent and mistake of fact, commented upon the reform movement which advocated changing the nature of the rape laws to a form of assault. He stated that the question of consent was seldom at issue in traditional assault, but that the essential element of rape was intercourse without consent.[409]

In reviewing the concept of consent in rape, Lewis discussed the ideas of Lorenne Clark and Debra Lewis in their book Rape: The Price of Coercive Sexuality.[410] Clark and Lewis had drawn a comparison between sexual intercourse and the exchange of money, stating that the law assumed that if the recipient of money used force, the doner did not consent, for the existence of coercion negated the presumption of consent on the part of the giver. The writers stated that the relevant issue was the offender's behaviour and not the victim's state of mind. In a case of rape, it was argued, the use of force or threat of force should negate any presumption of consent on the victim's part.[411]

Thomas J. Lewis refuted this argument, and noted that the exchange of money generally occurs in public and can be publicly verified, whereas sexual relations generally occur in a private place. Consequently, in the absence of physical violence, lack of consent in a charge of rape is difficult to establish. He stated;

> In the absence of evidence of violence, the generally private and non-instrumental nature of sexual transactions largely removes the possibility of the complainant's enjoying an initial presumption of credibility if the accused admits intercourse but claims consent. Because what has occurred does not on the surface deviate from normal, or at least legal, sexual decisions, the balance of credibility is appropriately much more even, with no presumption in favour of the complainant or the accused. This would not be the case if there was evidence of violence. It is in instances in which there is no evidence of violence, however, that the truly difficult problems arise.[412]

Mr. Lewis suggested that there are two ways that the law may respond to the inherent problem of consent in rape cases; that is, it can focus on the objective interpretation of whether consent was present, or, it can attempt to determine whether consent was present in a subjective sense. Did the accused believe the victim consented to sexual intercourse? The test will be subjective if the accused must have an honest belief in the consent and will be objective if that belief must be both honest and reasonable.[413]

Lewis also reviewed the decision of the House of Lords in Morgan and noted that as a result of the decision, a public outcry occurred in Britain. The press depicted the ruling as a "rapist's charter".[414] As a result of the controversy, an Advisory Group was appointed by the government to review the law of rape. The Group's report, the Heilbron Report, was presented to the British Parliament proposing a number of changes in the conduct of rape trials. The Heilbron Report supported the reasoning of the Law Lords in the Morgan decision, but recommended that a statutory definition of rape be provided to clarify, but not alter, the existing law to emphasize the importance of recklessness as a mental element in the crime of rape. It was recommended that the definition should emphasize that lack of consent, and not violence, as the crux of the matter, and that, in cases where the question of mistaken belief is raised, the presence or absence of reasonable grounds for such a belief is to be considered by the jury in conjunction with any other relevant matters.[415] The test in determining mens rea was to remain a subjective one. That is, the jury could only convict the accused if it was convinced the woman did not consent and this fact was understood by the defendant, or that the accused proceeded so recklessly as to disregard whether the woman consented.[416] Lewis supported this subjective test, arguing that it was sometimes difficult to distinguish rape from consensual intercourse and that to do so one had to sort out each of the person's actions, intentions and understanding. Lewis stated;

> Intercourse without consent is accepted as a serious violation of a woman's rights. It is a violation not only of her body, but also of her very sense of self. Even in the absence of serious bodily harm, it is a violation of an important right closely connected to one's sense of self or self-worth ... It would be an equally serious violation of [the defendant's] right of choice if he were to be convicted of a serious violation of the right of a woman, without scrupulous attention being paid to the question of whether he did in fact choose to do what was forbidden.[417]

Lewis maintained that to establish an objective test requiring the belief be both honest and reasonable would deny the accused his right to a fair trial.

In an article entitled "Culpable Mistakes and Rape: Relating Mens Rea to the Crime", Toni Pickard contends that a mistake about consent should only be accepted as a defence to a rape charge if the mistake is reasonable. In support of her argument, she contends that no man can find himself "unwitting" in the act of intercourse. That is, penetration is an act which cannot be done accidently or by mistake. She states that a man about to penetrate should as an initial matter have the responsibility to enquire into the issue of consent before proceeding, and should not be able to defend himself successfully against a rape charge by claiming that he had no belief whatsoever about consent because he simply did not put his mind to the issue. He must assert a belief in consent.

What is the quality of belief which will be sufficient to exonerate the accused? Pickard states that the cost of taking reasonable care by the accused in a potential rape situation is insignificant compared with the harm which can be avoided to the victim. In her view, it is sound policy to require reasonable care on behalf of the accused. In weighing the interests of the parties, she concludes that "a failure to inquire carefully into consent constitutes, in my view, such a lack of minimal concern for the bodily integrity of others that it is good criminal policy to ground liability on it."[418]

Other legal writers have held that it would be unfair to hold the accused liable for the unreasonable view which he formed of the world; however, Pickard argues that in the situation of non-consensual sexual intercourse, there is a very easy way for the accused to determine whether or not the victim is consenting. The accused can make verbal inquiry to determine the issue of consent. The law should require the accused to use a degree of care in his actions.[419] Mistake by an accused in determining consent could be easily avoided unless the actor is indifferent to the separate existence of those around him. She states;

> In rape, we are dealing not with the kind of mistake that results from the complexity of our endeavours and inevitable human frailty, but with an easily avoided and self-serving mistake produced by the actor's indifference to the separate existence of another. When the harm caused is so great, it seems clear to me that making such a mistake is sufficiently culpable to warrant criminal sanction.[420]

In the article entitled "Culpable Mistakes in Rape: Harsh Words on Pappajohn", Pickard criticizes Dickson, J.'s analysis of the defence of mistake of fact in the Pappajohn decision, stating that it lacked clarity, coherence, seriousness and perspective.[421] In all, Pickard argues that taking a uniform approach to the test of mens rea is not applicable where rape is concerned. What is important is the nature of the offence and the social cost of imposing a reasonable standard of behaviour.

In an article entitled "Pappajohn: Safeguarding Fundamental Principles",[422] Don Stewart outlines the background of the case law relating to mistake of fact in Britain and Canada, and discusses in detail the decision rendered by the Supreme Court of Canada in Pappajohn. To Stewart, the Pappajohn decision was important for it clarified the law of mistake of fact in the following ways:

1. The defence of mistake of fact is simply a denial of mens rea, that is, a negation of guilty intention rather than an affirmation of a positive defence. The accused is required to adduce sufficient evidence to put the defence in issue;

2. The requirement that a mistake of fact be both honest and reasonable is liability based on an objective standard which is not applicable in a mens rea offence like rape, but is compatible in establishing negligence;

3. The Court was aware of policy considerations involved in deciding the issue of mistake of fact. In the view of the Court, cases in which mistake of fact can be advanced are few in number, for an evidential case must exist to support the plea.[423]

Stewart contends that the Supreme Court properly upheld general principles of criminal law in the Pappajohn decision. He argued that changing the standard from a subjective standard to an objective standard might in fact work against the rape victim. He reasoned that if society generally believes that women who hitchhike or wear short skirts deserve to be raped, the average juror will naturally bring these prejudices with him or her in deciding what is "reasonable" in the circumstances surrounding the rape.[424] Stewart argues;

> In fact, the objective standard may well do more harm than good. Criteria such as 'reasonable', 'culpable', or 'morally at fault' may amount to vehicles for personal whim or peevishness and run afoul of the fundamental nulla poena sine lege [no penalty without law] principle ... The subjective approach, however, obliges us to judge the individual entirely on his own merits and his own thoughts. We should be cautious about convicting those who simply did not think or did not think well enough for whatever reason.[425]

Stewart concludes that Parliament should address the problem and distinguish between crimes in which culpability is based on a subjective standard and those of a lesser culpability based on an objective test. He states that the case for an objective standard in criminal law is not overwhelming and reminds us that the criminal sanction is a "blunt instrument" to be wielded with restraint.[426] Generally, the common person considers rapists to be wicked people; in the view of Stewart, a man who has sexual intercourse with a woman whom he believes is consenting, however unreasonable that belief is, may be stupid and insensitive, but he is not wicked.[427]

Stewart recommends that a new statutory offence be created to cover a situation where the accused had sexual intercourse with a victim where he was negligent as to the victim's consent. He states;

> We are rightly concerned with the victim of a crime. But we must also be concerned with the consequences of criminal conviction. Although most would agree that a convicted rapist needs severe punishment, we must remind ourselves that rape has a maximum penalty of life imprisonment, that rapists are invariably sent to penitentiary, most for a very long time, and have traditionally been considered dangerous when the question of parole comes to be considered. In this serious offence as in all other types of criminal sanctions, there is good reason to be mindful of using the force of the criminal law with restraint.[428]

## (2) CONCLUSION

As stated, at common law, a good defence to a criminal charge was an honest belief on the part of the accused in the existence of circumstances which would make the act an innocent one. The belief need not be reasonable. The issue was brought to the public's attention by the Morgan and the Pappajohn decisions. In both cases, the accused were found guilty of rape. The House of Lords and the Supreme Court of Canada held that an honest belief on the part of the accused was a good defence to a charge of rape. It would be a matter for the jury to determine whether the belief that the victim was consenting to intercourse was honest, and in doing so the jury would look to the reasonableness of the accused's actions. It was indicated by both Courts that the defence of mistaken belief would very rarely be put to the jury, for an evidentiary case would have to be first established.

Legal writers both defended and criticized these decisions.

Thomas A. Lewis stated that the issue of consent with regard to rape was a very difficult issue, for sexual intercourse generally takes place in private, and where there is no evidence of violence, there can be no presumption of credibility in favour of the complainant where the accused admits the intercourse but claims consent. Lewis supported the subjective test as being fairer to both complainant and accused.

Toni Pickard argued that mistake about consent should only be accepted as a defence to a rape charge if the mistake is reasonable. She maintained that the costs of taking reasonable care by the accused in a potential rape situation to ensure that the woman is in fact consenting is insignificant compared to the harm done to the woman if she is in fact not consenting. It is very easy for the accused to make a verbal enquiry of the woman to determine her state of mind. The law should require the accused to use a degree of care in its actions, in Pickard's view.

Don Stewart supported the subjective test and called upon the Canadian Parliament to address the problem of clarifying whether the test for mens rea should be objective or subjective in the case of rape. In his view, a new lesser offence to cover a situation where the accused was negligent in determining whether or not the woman was consenting could be created. He was of the opinion that a man who knows a woman is not consenting to sexual intercourse is a wicked man and should be punished severely, whereas a man who is merely negligent in determining whether a women is consenting to intercourse is not wicked and does not deserve harsh treatment by the law.

It can be seen that there was a great diversity of views on the issue of consent in the matter of a rape trial. Critics condemned the availability of the defence of mistake of fact as a "rapist's charter" which would provide an easy defence and acquittal to a rapist however proposterous his story might be. Although the decisions of the Court had spoken of the reasonableness of the circumstances being a yardstick for determining the honesty of the belief, critics condemned the availability of the defence of mistake with respect to the lack of consent as another element of the judicial process which was weighted against the victim.

## E. CONVICTIONS

> "Five years ago, even certainly ten years ago, when we first started practicing law, the easiest crime to get an acquittal on was rape. I mean, you just almost never found a conviction. It was just a a defence lawyer's heaven."
>
> Clayton Ruby[429]

Lorenne Clark and Debra Lewis have stated that the data on arrest, convictions and sentencing for those accused of rape showed that it was a myth that rape was treated as a serious crime. Their statistics reveal that only 58.3 percent of the 1,230 rapes reported in Canada in 1971 were "cleared" by an arrest.[430] In their Toronto study, statistics for 1970 demonstrated that only 59.5 percent of the "founded" rape cases were cleared by an arrest. Looking at both the "founded" and "unfounded/possibly founded" cases, the researchers found that only 24 percent of these cases led to an arrest.[431] Of the 119 suspects charged with rape in Canada in 1971, only 65, or 54.6 percent, were convicted. Further research revealed the conviction rate for rape in Ontario was 32.1 percent for the year 1971.[432] McCaldon stated that conviction rates for rape varied from 18 to 42 percent, depending on the source.[433]

Clark and Lewis commented;

> A rather harsher conclusion, that Canadian society tacitly condones rape, is borne out by an analysis of conviction rates. Of the 119 suspects charged with rape in Canada in 1971, only sixty-five (54.6%) were convicted. In 1962, the conviction rate for rape in Ontario was 42.0% ... The statistics vary considerably, but the current highest reported conviction rate for rape or a lesser offence is 51.2%.
>
> These figures are low in at least two senses. First, they are low in comparison with rates of conviction for other criminal offences. The vast majority of persons charged with a criminal offence plead guilty, and the general conviction rate is 86.0%, whatever the plea. But secondly, given the elaborate filtering system which brings only some rape cases to court, the number of convictions for rape represents only a tiny fraction of the number of rapes committed.[434]

In their Vancouver study, Clark and Lewis found that 46.3 percent of the "founded" cases were cleared by arrest and charge, and 40 percent of the offenders involved in "founded" cases were arrested and charged.[435] Based upon both "founded" and "unfounded/possibly founded" cases, the rate of cases cleared by arrest and charge was 22 percent.[436] These figures represent the period from 1970 to 1974. The researchers found that 50 percent of the cases which went to trial ultimately resulted in a conviction.[437]

It is not the purpose of this paper to examine and analyze statistics on convictions for rape in Canada from the 1800's to January 1, 1983. However, to facilitate a comparison of conviction rates of rape and other indictable offences, and for the purpose of illustration only, an appendix outlining statistics related to persons charged with indictable offences and sentences of convicted persons for the years 1962 to 1973 has been annexed to this paper.

It can be seen from the statistics and comments of legal writers and criminologists that generally, the conviction rate for rape was much lower than it was for other serious offences under the Criminal Code. As Neil Brooks has stated in his article "Rape and the Laws of Evidence";

> ... rape is still the most under-reported of all crimes against the person; estimates of the number of rapes reported compared to the number actually committed run as low as 5 percent, and never higher than about 30 percent. The number of rapes that are reported compared to the number in which suspects are arrested and brought to trial is lower than the rate for any other crime against the person.... If by chance a rape case gets to trial the chances of the accused being convicted are lower than for any other crime; in the United States, in 1972, only 32 percent of the persons prosecuted for forcible rape were convicted of that offence, and in Canada in 1971 only 51 percent of the prosecutions resulted in conviction."[438]

In reviewing these statistics, it is little wonder that some critics of the judicial system proposed that rape was the easiest crime to commit and escape detection.

## F. SENTENCING

### (1) The Factors

> Sentencing anyone, judges frequently tell us, is the most difficult decision that they have to make in a trial and far more trying for them than sorting the evidence and reaching a determination on the question of whether someone is legally guilty or not guilty ... One of the immediate difficulties we have is that judges tend not to discuss this sentencing aspect of their work in any personal way and when they do so, it is in a guarded fashion that is quite understandable ... Open, sensitive material from lawyers, police, probation officers and others involved in operating the entire system as it deals with sex offences has not been forthcoming.[439]

The three elements of sentencing in criminal matters are deterrence, rehabilitation and retribution. How have these factors affected the sentencing of the convicted rapist?

It is interesting, from an historical point of view, to note that in the nineteenth century, sentencing patterns showed a trend towards leniency in rape cases.[440] Until 1873, the crime of rape was a capital one. The Court was required to hand down a death penalty and the accused could make an application for pardon to have the sentence commuted. It appears that during the 1870's, the death penalty was meted out for rape, but sentences of life, eight years and seven years were also recorded. No record of capital sentences, and very few of life sentences are evident during the 1880's and early 1890's.[441] The typical sentence for rape during this period was seven to ten years, while the sentences for lesser offences of assault with intent to commit rape, indecent assault, attempted rape, and common assault ranged between several months to several years for the period from the 1840's to the 1890's.[442]

The similarity between sentencing patterns for rape in the nineteenth and twentieth centuries is illuminating.

Clark and Lewis have stated that although the Criminal Code provided severe penalties for rape, and although theoretically a convicted rapist could be sentenced to life imprisonment, it appeared that the average convicted rapist was not sentenced to more than ten years in prison.[443] The writers stated;

> The average sentence is believed to be from five to seven years. With remission and parole, this means that the convicted offender will not likely spend more than eighteen to twenty-four months in prison. National data on the sentencing of sixty-three convicted rapists in 1971 show that sentences ranged from a suspended sentence (in one case) to fourteen years or more (one case). Twenty-three rapists were sentenced to two to five years, twenty-eight to more than five years, and twelve to less than two years. Thus, the average length of sentence in Canada appears to be four to five years. In Ontario, the average sentence for rape between 1970 and 1973 was 4.3 years, and sentences ranged from a minimum of a $250.00 fine to a maximum of twelve years imprisonment.[444]

Clark and Lewis concluded that although society claimed that rape was treated as a serious crime, the sentencing patterns for rape proved otherwise, for the length of sentences for convictions for rape were shown to be comparable with sentences for robbery.[445]

What were the factors considered by the Court in the sentencing of rapists?

In his book entitled Sentencing,[446] Clayton C. Ruby states that in most penal sections of the Criminal Code only the maximum punishment for an offence is set out. Maximum and minimum penalties are generally not imposed except under the most unusual circumstances. Appropriate sentences are determined by the Court weighing all of the relevant principles and circumstances of the offence and the offender. However, a judge may also pay regard to other sentences for the same or similar crimes. As a result, certain patterns or ranges of sentences emerge.

In England, the Court of Appeal (Criminal Division) has approved a tariff or normal range of sentence for particular types of offences. In meting out sentences, the Court will adjust upwards or downwards to accommodate the particular offence and the individual offender. This tariff system has not been adopted in Canada, and Ruby argues that this helps to keep sentencing humane and reduces the likelihood of sentencing becoming a mechanical enterprise.[447]

While there is no tariff for sentencing in Canada, a range of sentences for a particular offence can be observed and analysed from a review of the cases. A few cases have been examined as a representative sample, in an attempt to understand the range of sentencing and the rationale behind the sentence.

As noted, the maximum punishment for rape was life imprisonment. The maximum penalty was said to be generally reserved for those offenders who appeared to the Court to be a real danger to the community, often due to a personality disorder approaching insanity.

In the case of R. v. Hill,[448] the accused was sentenced at trial to twelve years for rape. The Ontario Court of Appeal increased the penalty to life imprisonment. The facts involved the particularly brutal rape of a fourteen year old virgin who was babysitting at the home of the accused when the offence took place. The accused, a twenty-six year old married man, assaulted the victim with his fists, stripped her and raped her. When the girl tried to telephone for help, she was knocked to the floor by the accused, who then stabbed her repeatedly with a paring knife in the face and eyes with such force that the blade of the knife broke. It was feared that the victim would lose her sight in one eye. The Court heard evidence of the accused's aggressive tendencies. He apparently suffered from a mental or personality disorder which rendered him a danger to the community but which did not subject him to confinement in a mental institution. In this case, the Court held that it was appropriate for the accused to receive a life sentence.

In the case of R. v. Head,[449] the accused was also sentenced to life in prison. In this case, the accused, a forty-four year old man, was convicted of rape of a six year old girl. He had a previous conviction for indecent assault upon a young girl. Evidence showed that he was likely to commit similar offences. The six year old girl was injured in the attack and required surgery to her vagina. Indeed, the judge at the trial commented that the girl was lucky that she had not been killed during the attack, for the accused had penetrated her vagina four or five inches, causing a tear from the vagina to within a quarter of an inch of her anus. In this case, the Court of Appeal held that the prime factor involved in sentencing where the rehabilitation of the accused was not probable, was the protection of society.

It appears, where the facts of a rape were shocking, where the accused had past convictions for rape or other sexual offences, and an unpromising psychiatric history, the Court often found that a sentence of life imprisonment was appropriate.

In the case of R. v. Jones,[450] the victim, a sixteen year old girl, was dragged from the street by the accused, who hit her head against the side of the car, choked her into unconsciousness, and then raped her. The sentence of life meted out to the accused at trial was set aside on appeal. The accused, a thirty-two year old man with a psychiatric history which indicated that he was dangerous and poorly suited for treatment, had twenty-three previous criminal convictions and was an alcoholic. The Ontario Court of Appeal said that life imprisonment was too severe a penalty, for the twenty-three previous offences were not for violent crimes, although the accused had been convicted of assault causing bodily harm. Mr. Justice Arnup stated with regard to the sentence;

> A sentence of life imprisonment is too severe ... in several recent cases of rape, accompanied by violence and viciousness, this Court has approved or imposed sentences ranging from six to ten years.[451]

The sentence was reduced to twelve years.

Again in the case of R. v. Sinitoski,[452] the Alberta Court of Appeal reversed a sentence of life imprisonment where the accused had robbed and raped four women at knife point. The Court held that a life sentence was not appropriate in this particular case, as the attacks were not accompanied by "unusual" violence and the accused had no record of similar offences, although he did have a criminal record. In this situation, the accused was sentenced to a total of fourteen years.

In the case of R. v. Willaert,[453] the Ontario Court of Appeal reviewed the factors which should be taken into consideration in sentencing in a case of rape. It was stated that in the exercise of judicial discretion regard should be had to:

1. The age of the prisoner;
2. His past and present condition of life;
3. The nature of the crime;
4. Whether the accused previously had a "good character";
5. Whether it was a first offence;
6. Whether he had a family dependent upon him;
7. The "temptation";
8. Whether the crime was deliberate or committed on momentary impulse; and
9. The penalty provided by the Code or statute.

This case involved the rape of an eight year old girl by a man in his twenties. The accused was sentenced to a ten year penalty. The Court of Appeal reduced the sentence, stating that for a man in his twenties, a ten year sentence was equivalent to a life sentence. In this situation, it was held that a five year penalty was appropriate. The accused was a first offender with no evidence of "moral perversion" (aside from the rape of the eight year old girl). The fact that the young girl had suffered no physical violence aside from the rape, and the fact that the accused had testified that he had suffered greatly from his childhood in war-torn Belgium, were factors which influenced the Court's decision to reduce the sentence.

Ruby concluded that in cases not involving obvious sexual psychopaths, sentences for rape generally vary between one and twelve years.[454]

The Courts have stated that in some circumstances even a suspended sentence may be appropriate in a rape conviction. However, in the case of R. v. Shanower,[455] the accused's sentence was varied by the Ontario Court of Appeal from a suspended sentence to a three year prison term. The facts involved the rape of a fifteen year old babysitter of the accused, who was a virgin at the time of the attack. The victim had broken a glass bottle over the accused's head trying to resist the assault. The accused, a twenty-nine year old married man, was said to be a model citizen, and a good father and husband. The fact that he had been drinking at the time of the attack was held to be a mitigating factor. Also, the fact that the accused pleaded guilty to the charge was looked upon favourably by the Court for saving the victim the embarrassment of testifying at trial. In overturning the suspended sentence, the Court held that it must not forget the impact of the crime on the victim or the issue of deterrence, stating that in the circumstances it was not suitable that the accused receive a suspended sentence.

In passing sentence, the Court often took into account the fact that the victim and accused knew one another, and so, in the case of R. v. Shonias,[456] where a seventeen year old raped a fourteen year old girl, the accused was sentenced to one year in prison. The Court commented in sentencing that the fact that the accused and victim knew one another and that the accused had injured the victim, but not seriously, were mitigating factors in favour of a lenient sentence.

Another factor taken into account by the Court in sentencing was the character of the complainant. In the case of R. v. Simmons, Allen and Bezzo,[457] the victim, who had been drinking with the three accused, was taken in a car to an isolated spot and subjected to eight acts of forcible intercourse by the three accused. Each of the accused had a minor criminal record, but the Court said that this was "out of character for them."[458] Evidence was led to show that each of the accused had a drinking problem. They each received a sentence of six years. Mr. Justice Brooke of the Ontario Court of Appeal commented on the character of the complainant;

> The complainant's character is not without significance in the total picture. She was twenty-nine years old, married and separated, and living in a common law relationship when this offence occurred. She admitted to having relations with men with whom she met at bars and with whom she would dance. On the evening in question she apparently stepped out on her common law husband and went to the hotel to meet a blind date.[459]

Generally, the age of the accused was also an important factor in sentencing. In order to encourage the rehabilitation of the offender, the Court was more inclined toward leniency when the accused was a young man. In the case of R. v. Turner,[460] a twenty-two year old virgin was raped by two young men, one a juvenile and the other a sixteen year old. The rape occurred in a large municipal garage in the City of Windsor. Each of the accused brandished a knife, robbed the victim of her purse and parcels, and then forced her into the front seat of her car. The accused assaulted her indecently, inserting his finger into her vagina and rectum; her clothes were slit with a knife and she was threatened with death if she did not remain quiet. She was lifted and pushed backward over the front seat, where she fell upside down into the rear compartment of the car. The accused pinned her head and shoulders in the corner of the rear seat while the other tore off her clothing. Both accused then raped her. At trial, the adult accused was sentenced to eight years. The Ontario Court of Appeal reduced the sentence to six years, stating that the trial judge did not pay sufficient regard to the age of the accused or the prospect of his rehabilitation.

In the case of R. v. Bell, Christiansen, Coolen and MacDonald,[461] the victim, a sixteen year old high school student, was "gang raped" by a motorcycle gang and forced to commit other sexual acts, including fellatio, upon several different men. The trial judge stated that the victim had suffered a brutal, deliberate and vicious "gang rape" accompanied by sordid sexual attacks and exhibitions of the vilest kind.[462] Where the acts against the victim were said to be outrageous, the judge stated that the primary consideration in sentencing was the protection of society. Three of the accused were sentenced to ten years and the fourth was sentenced to twelve years in prison.

## (2) CONCLUSION

In reviewing the above referenced cases, Clayton Ruby concludes;

> Aggravating circumstances in a crime of rape include the fact that two or more men participate; that violence is done to the person of the victim beyond that necessary to effect rape; that the victim is a virgin or of tender years; that the victim was subjected to indecencies or unusual sexual practices; and that the offence was perpetrated through the use of a weapon. Where many of these factors are present, the sentence for the offence will often be in the range of from ten to twelve years. On the other hand, where these circumstances are absent this will be considered in mitigation.[463]

As noted earlier, Lorenne Clark and Debra Lewis have stated that it was a myth that rape was treated as a serious crime. They have stated that even a cursory look at sentencing reveals a contradiction between the theory and the practice.[464] The maximum penalty for rape provided by the Criminal Code was life imprisonment. It appeared that the maximum penalty was not often meted out, but was reserved for the most heinous acts of rape, for those offenders who appeared to be a real danger to the community, and where rehabilitation appeared to be unlikely. Where the acts were particularly violent, where the victim was a virgin or a young child, and where the victim was subjected to other gross and indecent acts, the accused would generally receive a longer sentence. However, where the attacks were not accompanied by unusual violence, where the accused had no record of similar offences, where the accused had a good character or a family dependent upon him, the Court tended to be more lenient. Further, where the accused and victim knew one another, or where the victim was shown to be of "poor character" in the eyes of the Court, the Courts tended to deal less harshly with the accused in sentencing. The fact that the accused had been drinking prior to the offence, or that he pleaded guilty and saved the complainant the embarrassment of testifying at trial, or the fact that the accused was a young man with some hope of rehabilitation, also influenced the Court in giving a lighter sentence.

Clark and Lewis condemned the system as failing to deal with the offence of rape as a serious crime. They stated;

> We are not advocating stiffer penalties for rape; we share the general scepticism about the effectiveness of the penal system, and have no reason to believe that prison either deters or rehabilitates rapists. Until the penal system is replaced with something else, however, it would appear to us that the penalties for rape ought to reflect our supposed moral judgments about the gravity of the crime. Otherwise, we should stop claiming that we condemn rape as a serious offence.[465]

Having looked briefly at sentencing patterns for rape in Canada, two studies will be reviewed relating to the treatment of convicted rapists in the penitentiary system.

## (3) THE TREATMENT OF THE RAPIST IN THE PENITENTIARY

In 1965, Dr. R.J. McCaldon, as noted earlier, began an investigation into the situation of rapists at the Kingston Penitentiary in Kingston, Ontario. Data was collected regarding thirty men who were serving sentences at Kingston Penitentiary for rape.[466] These men were interviewed in at least two psychiatric interviews, and five of the inmates were selected for more intensive exploratory therapy.[467]

What was the likelihood of the rehabilitiation of the convicted rapist? The most telling factor revealed by the study was the attitude of the offender to the offence. Only 33 percent of the rapists admitted committing the offence; 27 percent denied the offence; and 33 percent rationalized the offence; while 7 percent were said to be "amnesic".[468] The rapists were shown to have an essentially average distribution of intelligence quotient, were generally young (36 percent were between the ages of twenty-one and twenty-five years old), were mainly from lower socio-economic groups, and generally poorly educated - the majority not finishing public school.[469] It was shown that the rapists were generally of good health but had poor to fair work habits. The vast majority were Caucasian (83 percent) and English speaking (78 percent).[470] Thirty-three percent of the rapists were married at the time of the offence and 36 percent were single.[471] Not surprisingly, it was found that many marriages of the accused rapist failed once the offender was incarcerated.[472]

Seven percent of the rapists involved in the study were serving a life sentence. The average sentence was 10.1 years.[473] The psychiatric treatability of the rapists showed little promise; only 7 percent of the rapists were said to be good candidates for psychiatric treatment.[474] As McCaldon stated, part of the problem could be that psychiatry has not yet developed techniques for managing behaviour disorders.[475] Furthermore, it could also be that the rapists deny the offence in an attempt to protect themselves from the rest of the prison population, for it is a well-known fact that rapists are looked upon with great disdain by the general prison population.

McCaldon classified the rapist into three categories:

1. The "unlucky" group;
2. The sociopathic group; and
3. The defensive group.

The first, the unlucky group, were those who were falsely convicted because they were chronic offenders who were victimized by the police.[476] The number of offenders who fell into this classification was negligible.

The second group, the sociopathic, were said to be chronically anti-social, egocentric, short-sighted, manipulative, and devoid of any deep and meaningful interpersonal relationships. McCaldon stated that this group did not have a specific hatred of women but lacked feelings of tenderness for any man, woman or beast.[477]

For the third group, the defensive group, rape was a result of a specific fear and feeling of hostility towards women.[478] These men had a tendency to resort to excessive violence and sadism and showed signs of aggressive behaviour.

McCaldon stated that generally half of the convicted rapists fell into the sociopathic classification, while the other half fell into the defensive classification.[478] Very few of the offenders were considered good prospects for psychiatric treatment. McCaldon recommended that because rape is a serious and harmful offence, the removal of rapists from society for long periods was justifiable.[479] On a positive note, he found that those rapists within the sociopathic category seemed to "burn out" with time, while the young defensive rapist matured somewhat over the years, becoming less violent.[480]

Clark and Lewis had asked the fundamental question "Why do men rape?" In reviewing the information from the General Occurrence Reports, the researchers were intrigued by the information relating to conversations which took place between the victim and the offender during the commission of the offence. The conversations were revealing in attempting to understand the rapist's motivation and state of mind. The researchers were struck by the fact that the majority of rapists involved did not appear to believe that they were committing a crime, and in fact went to great lengths to show that their behaviour was normal and acceptable.[481] This factor of denial was also revealed by McCaldon's study.

For example, Clark and Lewis stated that on different occasions, rapists have asked the victim out on a date after the rape, have asked the victim for her telephone number,[482] and on one occasion, a rapist sent his victim roses after raping her. One victim, who was awakened in the middle of the night by a strange man twenty years her junior, was told during the commission of the crime, that he loved her.[483] Others rapists have asked whether the victim was enjoying the "love-making".[484] Clark and Lewis concluded that most rapists do not feel that they are doing anything wrong, but are able to rationalize their behaviour as "seduction" of the victim, rather than rape.[485]

J.S. Wormith of the Regional Psychiatric Centre for the Prairies and the Department of Psychology at the University of Saskatchewan, conducted a study of inmates incarcerated in Federal Prairie Region Institutions in 1979. The results were published in an article entitled "A Survey of Incarcerated Sexual Offenders".[486]

Wormith stated that there was very little scientific data on sex offenders; in his review of the criminological literature, he found that only 1.44 percent of the material dealt specifically with sex offenders.[487] The problem of lack of information on the sex offender is exacerbated by the lack of programs and treatment facilities in the institutions where they are held. Wormith found that only 8 percent of the federally incarcerated offenders in 1977 received any kind of specialized treatment.[488]

Wormith conducted a computer search of all inmates incarcerated in Federal Prairie Region Institutions at the time of the survey in 1979, isolating the current major offence of each offender. A list of offenders was prepared and site visits were made to the penitentiaries to identify the staff responsible for each offender. The staff person was requested to answer a three page questionnaire for each offender, and in doing so was encouraged to review the offender's file and to rely upon personal knowledge of the offender. In all, 205 cases were reviewed, each of which had a sexual offence as their major offence.[489]

The average sentence of the offenders was 65.76 months.[490] Most of the offenders were from large, urban communities (60 percent), 33 percent were of native ancestry, and 27 percent were married at the time of the offence. The majority (59 percent) were within the average range of intellectual capacity.[491]

Based on staff evaluations of the offenders, Wormith judged the prospects for treatment. It was said that 67 percent required treatment for sexual deviations.[492] Less than 65 percent of the inmates would admit to having committed the offence or claimed that they could not recall it.[493] Thirty percent refused to discuss the offence at all with any of the penitentiary staff, and 70 percent were not interested in participating in any treatment programs in the penitentiary although more showed an interest in participating in programs, outside the prison system.[494]

One must remember that unlike the McCaldon study, this study included sex offenders in general, including paedophiles, rapists and those who had committed indecent assault upon other men.

Wormith concluded that "the successful amelioration of sexual offenders aberrant behaviour [was] an onerous task".[495] He concluded;

> First, the motivation and self-perception of the inmate was a most important factor in anticipating potentially derived benefit. It is apparent that many sexual offenders display no overt interest in changing their lifestyles. A large majority of the sample claimed satisfaction with its sexual orientation and was not interested in treatment. Since most are disinclined to discuss the nature of their offence and many treatment programs for sexual offenders are peer group oriented, the difficulty in treating a sizeable portion of sexual offenders becomes immediately apparent. Secondly, the intellectual capacity of many sexual offenders is limited ... Third, there is a tendency for any previous community support in terms of marital relationship to disintegrate during incarceration. Fourth, the correctional environment may not be conducive to effective programming because motivation for treatment, which is marginal at best, is particularly low when services are provided in a prison setting.[496]

It would appear that the average rapist is an unlikely candidate for rehabilitation in our present prison system.

The Law Reform Commission in its Working Paper Number 22 stated that the criminal process should impose sanctions to show disapproval and exert control, and only when this is done should rehabilitation be taken into account.[497] The Commission has stated that sexual offences, unlike most other offences, are seen as a form of irrational behaviour by our society. For example, it was said that people can understand hitting out at another person in anger, but cannot understand a person's desire to expose his genitals in public.[498] The Commission suggested that we devise treatment plans for those offenders wishing treatment, but indicated that options for treatment were not always available.

## (4) CONCLUSION

In reviewing the above-noted studies, it would appear that the options for rehabilitation of the convicted rapist are few, especially in view of the fact that the majority would not even admit they have commited an offence.

Few treatment programs exist and few convicted rapists are interested in participating in such programs in any case.

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